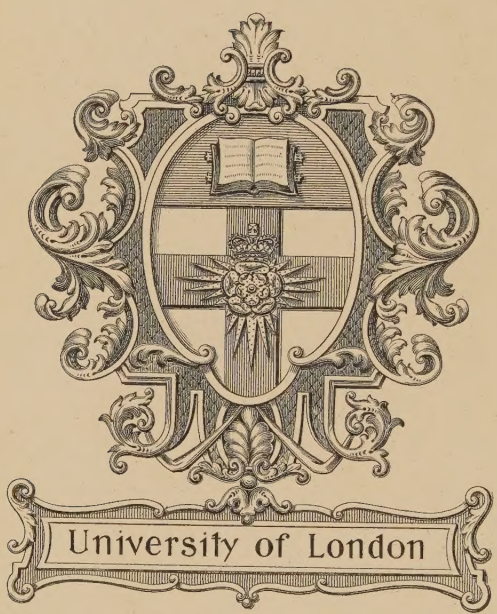
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gall



THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. DICKENS, Esq., K.C.
Vice-Chairman—T. R. HUGHES, Esq., K.C.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR GORDON HEWART, M.P. . ATTORNEY-GENERAL
SIR E. M. POLLOCK, M.P. . . . SOLICITOR-GENERAL.
CHARLES HENRY MORTON, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. TOMLIN, Esq., K.C. W. R. SHELDON, Esq.	Lincoln's Inn.
H. F. DICKENS, Esq., K.C. SIR HUGH FRASER.	Inner Temple.
C. C. SCOTT, Esq., K.C. A. MACMORRAN, Esq., K.C.	Middle Temple.
EDWARD CLAYTON, Esq., K.C. W. GREAVES-LORD, Esq., K.C.	Gray's Inn
T. R. HUGHES, Esq., K.C., of Lincoln's Inn. E. W. HANSELL, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
J. W. BUDD, Esq. (Firm—Messrs. Budd, Johnson & Jecks). SIR WALTER TROWER (Firm—Messrs. Trower, Still & Co.).	The Law Society.

Secretary—P. NOBLE FAWCETT, Esq., 30, Montague Street, W.C.1.

1921.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

House of Lords . . . . H. B. HEMMING, *Barrister-at-Law.*

Privy Council . . . . A. M. TALBOT, *Barrister-at-Law.*

1921.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1.

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

ERRATA.

Page	*Line*	*For*	*Read*
305	11	*P. S. Bateman K.C.*	*P. Davidson K.C.*
368	8 from bottom	Irish Bar	English Bar
375	4 from bottom	*John B. & F. Purchase*	*John B. & F. Purchase & Clark.*

814, 815 To names of counsel appearing add:

J. A. Stainton for appellant, *W. N. Stable* for respondent.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1921, will be as follows:—

In the First Series,
[1921] 1 Ch. [1921] 2 Ch.

In the Second Series,
[1921] 1 K. B. [1921] 2 K. B. [1921] 3 K. B. [1921] P.

In the Third Series,
[1921] 1 A. C. [1921] 2 A. C.

The Scottish Law Reports are cited as follows:

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	„	„	„	.	.	„	D.
Macpherson, or, Third Series	„	„	„	.	.	„	M.
Rettie, or, Fourth Series	„	„	„	.	.	„	R.
Fraser, or, Fifth Series	„	„	„	.	.	„	F.
New Series	„	„	„	.	.	„	1907 S. C.
Scottish Law Reporter	„	„	„	.	.	„	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Admiralty Commissioners, Elliott Steam Tug Co. *v.* H. L. (E.)	137
Page *v.* – – H. L. (E.)	137
Alexander Shukoff (Owners of S.S.) *v.* Gothland (Owners of S.S.) – – – H. L. (E.)	216
Attorney-General *v.* Cory Bros. & Co. – – H. L. (E.)	521
Attorney-General for Canada, Attorney-General for Quebec *v.* P. C.	401
Attorney-General for Canada *v.* Attorney-General for Quebec P. C.	413
Attorney-General for Quebec *v.* Attorney-General for Canada P. C.	401
Attorney-General for Quebec, Attorney-General for Canada *v.* P. C.	413
Axel Johnson, The – – P. C.	473

B.

PAGE
Bastien, Quebec City *v.* P. C. 265
Bernisse, The – – P. C. 458
Britain Steamship Co. *v.* The King – – – H. L. (E.) 99
British and Foreign Insurance Co. *v.* Wilson Shipping Co. H. L. (E.) 188
British India Steam Navigation Co., Green *v.* H. L. (E.) 99
British India Steam Navigation Co. *v.* Liverpool and London War Risks Insurance Association – H. L. (E.) 99

C.

Cairnsmore, The – – P. C. 439
Coal (Fife) Co. *v.* Sharp H. L. (Sc.) 329
Coman *v.* Rotunda Hospital, Dublin (Governors) H. L. (I.) 1
Compagnie de Jésus, Laprairie Common Corporation *v.* P. C. 314
Corser, Russell, Ld. *v.* H. L. (Sc.) 351
Cory Bros. & Co., Attorney-General *v.* – – H. L. (E.) 521
——— Kennard *v.* H. L. (E.) 521
County Hotel and Wine Co. *v.* London and North Western Ry. Co. – – H. L. (E.) 85
Cowan & Sons, Marlborough Hill (Ship) *v.* – – P. C. 444
Crowe, Gerrard *v.* – P. C. 395
Curtis's and Harvey (Canada), Ld. *v.* North British and Mercantile Insurance Co. – P. C. 303

D.

Despatie *v.* Tremblay – P. C. 702
Donnelly, Moore & Co. *v.* H. L. (Sc.) 329
Drottning Sophia, The – P. C. 473
Dunlop, Dunlop Rubber Co. *v.* – – – H. L. (I.) 367

PAGE
Dunlop Rubber Co. *v.* Dunlop H. L. (I.) 367

E.

Edna, The – – – P. C. 735
Elliott Steam Tug Co. *v.* Admiralty Commissioners H. L. (E.) 137
Elve, The – – – P. C. 458
Everett *v.* Griffiths H. L. (E.) 631

F.

Falk, The – – – P. C. 787
Fife Coal Co. *v.* Fyfe H. L. (Sc.) 329
——— *v.* Sharp H. L. (Sc.) 329
Fyfe, Fife Coal Co. *v.* H. L. (Sc.) 329

G.

Gatty, Maclaine *v.* H. L. (Sc.) 376
Gerrard *v.* Crowe – – P. C. 395
Gothland (Owners of S.S.), Alexander Shukoff (Owners of S.S.) *v.* – – H. L. (E.) 216
Larenberg (Owners of S.S.) *v.* – – – H. L. (E.) 216
Govindasamy, Indian Immigration Trust Board of Natal *v.* – – – P. C. 433
Green *v.* British India Steam Navigation Co. – H. L. (E.) 99
Griffiths, Everett *v.* H. L. (E.) 631
Gunda, The – – – P. C. 439

H.

Hemelryck *v.* William Lyall Shipbuilding Co. – P. C. 698
Hotel and Wine (County) Co. *v.* London and North Western Ry. Co. – – H. L. (E.) 85

I.

PAGE

Indian Immigration Trust Board of Natal *v.* Govindasamy – – – P. C. 433
Insurance (British and Foreign) Co. *v.* Wilson Shipping Co. H. L. (E.) 188
Insurance (North British and Mercantile) Co., Curtis's and Harvey (Canada), Ld. *v.* P. C. 303
Insurance (Scottish Union and General) Co. *v.* New Zealand and Australian Land Co. H. L. (Sc.) 172

J.

Jaffrey, Lord Advocate *v.* H. L. (Sc.) 146

K.

Kennard *v.* Cory Bros. & Co. H. L. (E.) 521
Kronprinsessan Margareta, The P. C. 486

L.

Lampson *v.* Quebec City P. C. 294
Land (New Zealand and Australian) Co., Scottish Union and National Insurance Co. *v.* H. L. (Sc.) 172
Laprairie Common Corporation *v.* Compagnie de Jésus P. C. 314
Larenberg (Owners of S.S.) *v.* Gothland (Owners of S.S.) H. L. (E.) 216
Lincoln (Bishop), Wakeford *v.* P. C. 813
Liverpool and London War Risks Insurance Association, British India Steam Navigation Co. *v.* – H. L. (E.) 99
London and North Western Ry. Co., County Hotel and Wine Co. *v.* – H. L. (E.) 85

PAGE

Lord Advocate *v.* Jaffrey H. L. (Sc.) 146
Lucas-Tooth *v.* Lucas-Tooth H. L. (E.) 594

M.

Maclaine *v.* Gatty H. L. (Sc.) 376
Malan, Thompson *v.* – P. C. 726
Marlborough Hill (Ship) *v.* Cowan & Sons – – P. C. 444
Matiana (The) Case H. L. (E.) 104
Mendip Range (Owners of S.S.) *v.* Radcliffe – H. L. (E.) 556
Montreal City *v.* Sainte Marie Collège – – – P. C. 288
Moore & Co. *v.* Donnelly H. L. (Sc.) 329
Mountain *v.* Whittle H. L. (E.) 615

N.

New Zealand and Australian Land Co., Scottish Union and National Insurance Co. *v.* H. L. (Sc.) 172
Norne, The – – – P. C. 765
North British and Mercantile Insurance Co., Curtis's and Harvey (Canada), Ld. *v.* P. C. 303

O.

Orduna (Owners of S.S.) *v.* Shipping Controller H. L. (E.) 250
Oscar II. (No. 2), The – P. C. 467

P.

Page *v.* Admiralty Commissioners – – H. L. (E.) 137
Parana, The – – – P. C. 486
Paulson, Rex *v.* – – P. C. 271
Petersham (The) Case H. L. (E.) 100

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Birkenhead L.C.

Commissioners have not expressly stated whether they found that Case 1 or Case 6 applied, but having regard to the contention of the Surveyor of Taxes, as set out in para. 6 of the case stated, I think it is clear that they were of opinion that the respondents were in fact carrying on a business, and intended so to hold. The point however is not of great moment, as in my opinion one or other of these cases applies, and the assessments if not valid under Case 1 could in any case be supported under Case 6. The absence of precise data forming materials for assessment is not necessarily in itself an objection to an assessment, but the case clearly shows that there was evidence before the Special Commissioners upon which they came to a conclusion to which they could properly come. There is in my opinion no substance in the objection.

The sixth proposition I have in substance already rejected. It would, in my view, be impossible to say that the respondents did not carry on a trade or adventure in the nature of a trade without also excluding the business of letting furnished houses or many of the cases of letting or allowing the use of theatres, music halls and other places of public entertainment, or without overruling the *Carlisle Case* (1), which in my opinion was rightly decided.

The seventh proposition has also already been dealt with and is equally without substance.

When the facts set out in the case stated and the documents annexed to it are considered as a whole, it becomes plain that the respondents, with the laudable object of raising an income for the support of their charitable activities, have engaged in what can only be described as a business or a concern in the nature of business, and thereby have earned annual profits which are outside the scope of Sch. A. They are therefore taxable under Sch. D. No exemption conferred by the Income Tax Acts is applicable to these profits, and it follows that they are liable to income tax and that the assessments appealed against were duly made. I therefore move your Lordships to reverse the decision appealed against and to restore that of the Special Commissioners.

(1) [1913] 3 K. B. 75.

VISCOUNT FINLAY. My Lords, the Rotunda Hospital was incorporated by Royal Charter dated December 2, 1756, for the relief of poor lying-in women. The Rotunda Rooms are contiguous to the hospital and are vested in the Governors of the charity, the respondents on this appeal. The legal occupation of the rooms is and always has been in the respondents, but they are hired out by them for entertainments, concerts, cinema shows, etc., for periods varying from one night to six weeks. The rooms have a proscenium and platforms, and when they are hired out they are equipped with seats, and heating, lighting and attendance are provided by the respondents.

The respondents were assessed under the Income Tax Sch. D in respect of the profits made from the letting of the rooms thus equipped, and the Commissioners for Special Purposes stated a case for the opinion of the Court, upon which this appeal arises. Paras. 7 and 8 of the case are as follows :—

" 7. In arriving at the precise quantum of liability, the Surveyor of Taxes was prepared in the circumstances to allow the net annual value, 250*l.*, of the Rotunda Rooms (vide paragraph 4 of this case) as a deduction in arriving at the profits assessable under Schedule D. He also admitted that certain adjustments fell to be made in respect of renewals of flooring, platforms, seating and furniture—also a proportion of the general administrative salaries as applicable to the letting of the Rooms, with the result that the amended liability would be as under :—

For the year ended April 5, 1912	£223
For the year ended April 5, 1913	327
For the year ended April 5, 1914	405
For the year ended April 5, 1915	381

" The appellants agreed that if the profits in question are held to be assessable to Income Tax, Schedule D, the figures as above may be taken as correct.

" 8. Having considered the facts and contentions herein set forth we were of opinion that the profits derived from letting the Rotunda Rooms were assessable to Income Tax,

		PAGE
Bawtry, The	2 Russ. & Jap. P. C. 265	488
Becker, Gray & Co. *v.* London Assurance Corporation	[1918] A. C. 101	103
Benue, The	[1916] P. 88	219
Beryl, The	9 P. D. 137	557
Betsey, The	1 C. Rob. 93.	478
Bickett *v.* Morris	L. R. 1 H. L. Sc. 47	399
Birch *v.* Wright	1 T. R. 378	284
Board of Education *v.* Rice	[1911] A. C. 179	659
Bolton *v.* Carlisle (Bishop)	2 H. Bl. 259	278
Bott *v.* Ackroyd	28 L. J. (M. C.) 207	639
Bottomley *v.* Brougham	[1908] 1 K. B. 584	638
Bourton *v.* Beauchamp	[1920] A. C. 1001; 12 B. W. C. C. 118	330
Brita Cæcilia, The	Hay & Marriott, 234	756
British and Foreign Steamship Company *v.* The King	[1917] 2 K. B. 769; [1918] 2 K. B. 879	102
British Columbia Electric Railway Company *v.* Loach	[1916] 1 A. C. 719	638
Broken Hill Company *v.* P. & O. Company	22 Com. Cas. 178	446
Brooke *v.* Inland Revenue Commissioners	[1918] 1 K. B. 257	45
Brookshaw *v.* Hopkins	Lofft, 235	638
Brown *v.* Curé de Montréal	L. R. 6 P. C. 157	706
Bruce Marriott & Co. *v.* Houlder Line	22 Com. Cas. 116	446
Burr *v.* Smith	[1909] 2 K. B. 306	638
Busk *v.* Locke	1 My. & Cr. 422n.	598
Butterley Company *v.* New Hucknall Colliery Company	[1910] A. C. 381	529
Bywell Castle, The	4 P. D. 219	252

C.

Cap Blanco, The	[1913] P. 130	446
Capel *v.* Child	2 Cr. & J. 558	637
Capital and Counties Bank *v.* Henty	7 App. Cas. 741	369
Carl Walter, The	4 C. Rob. 207	775
Carlisle and Silloth Golf Club *v.* Smith	[1912] 2 K. B. 177; [1913] 3 K. B. 75; 6 Tax Cas. 48, 198	4, 21, 33
Caroline Miller, The	53 Fed. Rep. 136	445
Carron Company *v.* Henderson's Trustees	33 R. 1042	379
Cartwright *v.* Sculcoates Union	[1900] A. C. 150	28
Castellain *v.* Preston	11 Q. B. D. 380	192
Catherine and Anna, The	4 C. Rob. 39	442
Catterall *v.* Sweetman	1 Rob. E. 304	704
Cave *v.* Mountain	9 L. J. (N. S.) (M. C.) 90	639
Ceto, The	14 App. Cas. 670	557
Ceylon, The	1 Dods. 105	736
Chadwick *v.* Manning	[1896] A. C. 231	379
Charlotte, The	5 C. Rob. 275	490
Chasemore *v.* Richards	7 H. L. C. 349	266, 396
Citizens Insurance Company *v.* Parsons	7 App. Cas. 96	306
Clough *v.* London and North Western Railway Company	L. R. 7 Ex. 26	283

		PAGE
Clyde Navigation Company *v.* Barclay	1 App. Cas. 790	219
Colquhoun *v.* Brooks	14 App. Cas. 493	42, 69
Coltness Iron Company *v.* Black	6 App. Cas. 315	6
Commercen, The	1 Wheat	382, 755
Commissaire d'Ecole *v.* Price	1 Rev. de Jur. 122	402
Compania Sansinena *v.* Houlder Bros. & Co.	[1910] 2 K. B. 354	447
Conway *v.* Pumpherston Oil Company	1911 S. C. 660	330
Cooke *v.* Midland Great Western Railway of Ireland	[1909] A. C. 229	638
Cooper *v.* Cooper	13 App. Cas. 88; 15 R. (H. L.) 21	149
Corsican Prince, The	[1916] P. 195	755
Cory *v.* Burr	8 App. Cas. 393	306
Croft *v.* Lumley	6 H. L. C. 672	273
Cunliffe Brook's Case	[1906] A. C. 56; 8 F. (H. L.) 4	161

D.

Daksa, The	[1917] A. C. 386	491
Danckebaar Africaan, The	1 C. Rob. 107	488, 775
Danvers *v.* Clarendon (Earl)	1 Vern. 35	597
Danzig, The	Br. & Lush. 102	445
Davenport *v.* The Queen	3 App. Cas. 115	286
Dawes *v.* Tredwell	18 Ch. D. 354	86
Dawkins *v.* Rokeby (Lord)	L. R. 8 Q. B. 255; L. R. 7 H. L. 744	639
De Fortuyn, The	1 Burrell, 175	478
Delpit *v.* Coté	Q. R. 20 S. C. 338	704
Dirigo, The	[1919] P. 204	787
Doe *v.* Frost	3 B. & Al. 546	598
Dolphin *v.* Robins	3 Macq. 563; 7 H. L. C. 390	146, 148
Dominion Natural Gas Company *v.* Collins	[1909] A. C. 640	638
Dominion of Canada *v.* Province of Ontario	[1910] A. C. 637	403
Dora Forster, The	[1900] P. 241	192
Doswell *v.* Impey	1 B. & C. 163	637
Drummond *v.* Collins	[1915] A. C. 1011	45, 67
Dublin, &c., Railway Company *v.* Slattery	3 App. Cas. 1155	669
Durocher *v.* Degré	Q. R. 20 S. C. 456	705
Düsseldorf, The	[1920] A. C. 1034	439, 477, 799

E.

Elder, Dempster & Co. *v.* Dunn & Co.	15 Com. Cas. 49	446
Eleonora Whilelmina, The	6 C. Rob. 331	490
Eliot *v.* Allen	1 C. B. 18	636
Eliza, The	1 Spinks, 8	789
Elizabeth, The	1 Acton, 10	792
Elize, The	Spinks, 88	750
Emanuel, The	1 C. Rob. 296	756

		PAGE
Essex Hall, Ex parte	[1911] 2 K. B. 434; 5 Tax Cas. 636	4, 19
Evans *v.* Barrett	Not reported	817
—— *v.* Woods	[1900] A. C. 338	818

F.

Farquharson *v.* Farquharson	Mor. 12779; 3 Bli. N. S. 421	397
Ferguson *v.* Kinnoull (Earl)	9 Cl. & F. 251	637
Flanagan *v.* Great Western Railway Company	L. R. 7 Eq. 116	86
Fletcher *v.* Fletcher	1 E. & E. 420	638
—— *v.* Rylands	L. R. 1 Ex. 265; L. R. 3 H. L. 330	522
Foley *v.* Fletcher	28 L. J. (Ex.) 100	67
Ford *v.* Chesterfield (Earl of)	19 Beav. 428	379
Fortuna, The	Edw. 56	761
Foxhall *v.* Barnett	23 L. J. (Q. B.) 7	689
France, Fenwick & Co. *v.* Merchants' Marine Insurance Company	30 Times L. R. 609	106
—— *v.* North of England Protecting Association	[1917] 2 K. B. 522	104
Franciska (No. 2), The	10 Moo. P. C. 73	441
Franklin, The	3 C. Rob. 217	490
Fraser *v.* Balfour	34 Times L. R. 502	638
Fray *v.* Blackburn	3 B. & S. 576	666
Frederick Molke, The	1 C. Rob. 86.	488
Frith, In re	85 L. T. 455	597
Fry *v.* Shiel's Trustees	6 Tax Cas. 583	67

G.

Geddis *v.* Bann Reservoir Proprietors	3 App. Cas. 430	266
Gelen *v.* Hall	2 H. & N. 379	640
Gent and Eason's Contract, In re	[1905] 1 Ch. 386	43
George, The	1 Mason, 24	792
Georgia, The	7 Wall. 32	743
Globensky *v.* Wilson	Mon. L. R. 2 S. C. 147	705
Gramophone and Typewriter *v.* Stanley	[1908] 2 K. B. 89	5, 43
Grant *v.* Norway	10 C. B. 665	446
Grant, Smith & Co. *v.* Seattle Dry Dock Company	[1920] A. C. 162	616
Grayson, In re	48 L. J. (Ch.) 354	597
Greenock Corporation *v.* Caledonian Railway Company	[1917] A. C. 556	537
Gresham Life Assurance Society *v.* Bishop	[1901] 1 K. B. 153; [1902] A. C. 287	43
Greyvensteyn *v.* Hattingh	[1911] A. C. 355	398
Grimwood *v.* Moss	L. R. 7 C. P. 360	285
Grove *v.* Young Men's Christian Association	88 L. T. 696; 4 Tax Cas. 613.	4

H.

H.M. Submarine E 14	[1920] A. C. 403	743
Haggard *v.* Pélicier Frères	[1892] A. C. 61	666
Hakan, The	[1916] P. 266; [1918] A. C. 148	490, 756, 786, 804

		PAGE
Hall *v.* Lund	1 H. & C. 676	529
—— *v.* Semple	3 F. & F. 337	636
Hamborn, The	[1919] A. C. 993	489
Hamilton *v.* Anderson	3 Macq. 363	679
Harding *v.* Brynddu Colliery Company	[1911] 2 K. B. 747	331
Hardman *v.* North Eastern Railway Company	3 C. P. D. 168	395
Harris *v.* James	45 L. J. (Q. B.) 545	527
Harward *v.* Hackney Union	14 Times L. R. 306	636
Hawthornbank, The	[1904] P. 120	558
Hébert *v.* Clouâtre	Q. R. 41 S. C. 249	704
Hendrick and Jacob, The	Unreported	478
Henry & MacGregor *v.* Marten	34 Times L. R. 504	102
Herbert *v.* Fox & Co.	[1916] 1 A. C. 405	345, 347
Highley's Case	[1917] A. C. 352	337
Hobbs *v.* Guardian Assurance Company	12 Can. S. C. R. 631	304
Hodgkinson *v.* Wilkie	1 Hagg. Con. 262	704
Hodson *v.* Pare	[1899] 1 K. B. 584	638
Hood *v.* Murray	14 App. Cas. 124	609
Hooley Hill Company and Royal Insurance Company, In re	[1920] 1 K. B. 257	304
Hsiping, The	2 Russ. & Jap. P. C. 140	488
Huntley *v.* Gaskell	[1906] A. C. 56; 8 F. (H. L.) 4	149
Hutchinson *v.* National Refuges for Homeless and Destitute Children	[1920] A. C. 794	597
Huxley, Ex parte	[1916] 1 K. B. 788	67

I.

Immanuel, The	2 C. Rob. 186	490
Income Tax Commissioners *v.* Pemsel	[1891] A. C. 531	6
Inui Gomei Kaisha *v.* Attolico	Lloyd's List, July 20, 1918	102
Iona, The	L. R. 1 P. C. 426	219
Ionides *v.* Universal Marine Insurance Company	14 C. B. (N. S.) 259	102
Ironsides, The	Lush. 458	445

J.

Jan Frederick, The	5 C. Rob. 127	488, 777
Jeanne, The	[1917] P. 8	755, 775
John, The	2 Dods. 336	478
Johnson *v.* Taylor Bros. & Co.	[1920] A. C. 144	698
Jones *v.* Carter	15 M. & W. 718	284
Jonge Margaretha, The	1 C. Rob. 188	490
Jonge Tobias, The	1 C. Rob. 329	490, 755
Jorden *v.* Money	5 H. L. C. 185	379
Juffrow Maria Schroeder, The	3 C. Rob. 147	793
Juno, The	[1916] P. 169	755

K.

Kinahan *v.* Kinahan	45 Ch. D. 78.	369
Kirby *v.* Simpson	10 Ex. 358	640
Knight *v.* Faith	15 Q. B. 649.	190

		PAGE
Kronprins Gustaf Adolf, The	2 Br. & Col. P. C. 418	789
Kronprinsessan Margareta, The	[1921] A. C. 486	765, 784
Kronprinzessin Victoria, The	[1919] A. C. 261	490

L.

Lane *v.* Santeloe	1 Stra. 79	640
Languedoc *v.* Laviolette	1 Low. Can. Jur. 240; 8 Low. Can. Rep. 257	704
Law *v.* Llewellyn	[1906] 1 K. B. 487	639
Lawrence *v.* Accident Insurance Company	7 Q. B. D. 216	104
Larchgrove (Owners of S.S.) *v.* The King	36 Times L. R. 108	102
Lee *v.* Atherton	[1904] A. C. 805	819
Leeds and Hanley Theatre of Varieties *v.* Broadbent	[1898] 1 Ch. 343	376
Leeson *v.* General Medical Council	43 Ch. D. 366	638
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	149
Leonora, The	[1919] A. C. 974	463
Le Sueur *v.* Le Sueur	1 P. D. 139	146
Leyland Shipping Company *v.* Norwich Union Fire Insurance Society	[1918] A. C. 350	102, 306, 616
Lidgett *v.* Secretan	L. R. 6 C. P. 616	190
Linford *v.* Fitzroy	13 Q. B. 240.	639
Livie *v.* Janson	12 East, 648	188
Local Government Board *v.* Arlidge	[1915] A. C. 120	639
Locke *v.* Southwood	1 My. & Cr. 411	598
Logan *v.* Bank of Scotland (No. 2)	[1906] 1 K. B. 141	370
London County Council *v.* Attorney-General	[1901] A. C. 26	25
Loraine *v.* Thomlinson	2 Doug. 585	132
Lorange *v.* Lauzon	18 Rév. de Jur. 407	705
Louisiana, The	[1918] A. C. 461	489, 798
Lovibond *v.* Lee	Not reported	819
Luna, The	Edw. 190	458
Lussier *v.* Archambault	11 Low. Can. Jur. 53	705
Lydia, The	2 Russ. & Jap. P. C. 367	488
Lysons *v.* Knowles	[1901] A. C. 79	364
Lyttelton Times Company *v.* Warners	[1907] A. C. 476	529

M.

M'Diarmid *v.* Ogilvy	1913 S. C. 1103	332
Mackenzie, In re	[1911] 1 Ch. 578	148
——— *v.* Childers	43 Ch. D. 265	86
Malcolm *v.* Lockhart	[1919] A. C. 463	4
Malzy *v.* Eichholz	[1916] 2 K. B. 308	527
Manchester Trust *v.* Furness	[1895] 2 Q. B. 539	446
Manningtry, The	[1916] P. 329	756
Mapp *v.* Straker	7 B. W. C. C. 18	351
Maracaibo, The	[1916] P. 266	804
Maréchal Suchet, The	[1896] P. 233	446
Margaret, The	1 Acton, 333	490
Maria, The	1 C. Rob. 340	459
Marie Glaeser, The	[1914] P. 218	786

		PAGE
Markt & Co. *v.* Knight Steamship Company	[1910] 2 K. B. 1021	447
Marriage Laws Reference, In re	46 Can. S. C. R. 132	705
Marshall *v.* Marshall	38 Ch. D. 330	369
Maughan *v.* Free Church of Scotland	30 S. L. R. 666; 3 Tax Cas. 207	4
Mawdsley *v.* West Leigh Colliery Company	5 B. W. C. C. 80	332
Maxey Drainage Board *v.* Great Northern Railway Company	106 L. T. 429	398
Menzies *v.* Breadalbane (Earl)	3 Bli. N. S. 414	397
Mercurius, The	1 C. Rob. 288n.	490, 755
Merryweather *v.* Nixan	8 T. R. 186	527
Mersey Docks and Harbour Board *v.* Birkenhead Assessment Committee	[1901] A. C. 175	28
Metropolitan Railway Company *v.* Jackson	3 App. Cas. 193	669
Mignault *v.* Hapeman	10 Low. Can. Jur. 137	705
Millar *v.* Toulmin	17 Q. B. D. 603; 12 App. Cas. 746	669
Mills *v.* Collett	7 L. J. (O. S.) (M. C.) 97	639
Minerva, The	3 C. Rob. 229	490
———	6 C. Rob. 396	736
Mitchell *v.* Heys	21 R. 600	379
Moakes *v.* Nicolson	19 C. B. (N. S.) 290	491
Monson *v.* Tussauds	[1891] 1 Q. B. 671.	369
Moore, Ex parte	2 Ch. D. 802.	379
——— *v.* Oxford (Bishop)	[1904] A. C. 283	818
Morrison & Co. *v.* Shaw Savill & Albion Company	22 Com. Cas. 81	446
Mortimer *v.* Slater	7 Ch. D. 322.	597
Mortimore *v.* Mortimore	4 App. Cas. 448	597
Möwe, The	[1915] P. 1	786
Munster *v.* Lamb	11 Q. B. D. 588	639

N.

Naval Store Ships, The	Hay & Marriott, 287	756
Negotie en Zeevaart, The	Unreported	500
Nelthorpe *v.* Dorrington	2 Lev. 113	278
Neptunus, The	3 C. Rob. 108	755
———	6 C. Rob. 403	488
Neutralitet, The	3 C. Rob. 295	490, 755, 805
New Chinese Antimony Company *v.* Ocean Steamship Company	[1917] 2 K. B. 664	446
Niboyet *v.* Niboyet	4 P. D. 1	170
Nield *v.* London and North Western Railway Company	L. R. 10 Ex. 4	398
Noordam, The	[1919] P. 57	765
Norman Monarch, The	Lloyd's List, Dec. 10, 1918	252
Nova Scotia Steel Company *v.* Sutherland Steam Shipping Company	5 Com. Cas. 106	376

O.

O'Connor *v.* Star Newspaper Company	30 L. R. Ir. 1	370
Odessa, The	[1916] 1 A. C. 145	502
Ogden *v.* Ogden	[1908] P. 46	149

		PAGE
Okehampton, The	[1913] P. 54, 173	446
Olympic and H.M.S. Hawke, The	[1913] P. 214	264
Ontario Mining Company *v.* Seybold	[1903] A. C. 73	403
Orr-Ewing *v.* Colquhoun	2 App. Cas. 839	400
Oster Risoer, The	4 C. Rob. 199	488, 759
Ostsee, The	9 Moo. P. C. 150	458, 737, 789

P.

P. Caland, The	[1893] A. C. 207	557
Packet de Bilboa, The	2 C. Rob. 133	488
Parchim, The	[1918] A. C. 157	489
Parlement Belge, The	5 P. D. 197	742
Paros, The	2 Russ. & Jap. P. C. 301	488
Partington *v.* Attorney-General	L. R. 4 H. L. 100	67
Partridge *v.* General Medical Council	25 Q. B. D. 90	640
Paterson *v.* Tod	6 S. 1062	379
Pearson *v.* Commercial Union Assurance Company	1 App. Cas. 498	616
Pease *v.* Chaytor	1 B. & S. 658	639
Pehping, The	2 Russ. & Jap. P. C. 162	488
Pellworm, The	[1920] P. 347	479
Peterhoff, The	5 Wall. 28	488, 755
Phillipson *v.* Hayter	L. R. 6 C. P. 38	668
Pickard *v.* Sears	6 Ad. & E. 469	386
Pieve Superiore, The	L. R. 5 P. C. 482	445
Pitman *v.* Universal Marine Insurance Company	9 Q. B. D. 192	190
Pitt *v.* Pitt	4 Macq. 627	160
Plumb *v.* Cobden Flour Mills Company	[1914] A. C. 62	331
Pollard *v.* Hagan	3 Howard, 212	415
Posteiro, The	3 Br. & Col. P. C. 275	488
Potter *v.* Campbell	16 W. R. 399	192
Prinz Adalbert, The	[1917] A. C. 586	489
Prosper, The	Edw. 72	761
Psalms and Hymns (Trustees of) *v.* Whitwell	3 Tax Cas. 7.	4
Pwllbach Colliery Company *v.* Woodman	[1915] A. C. 634	522

Q.

Quesnall Forks Gold Mining Company *v.* Ward	[1920] A. C. 222	273

R.

Ranza, The	79 L. J. (P. D. & A.) 21n.	252
Ratt *v.* Parkinson	20 L. J. (M. C.) 208	639
Rayner, In re	[1904] 1 Ch. 176	42
Redding *v.* Redding	15 R. 1102	149
Reg. *v.* Cork Justices	15 Cox C. C. 78	688
—— *v.* Dublin Corporation	2 L. R. Ir. 371	682
—— *v.* Local Government Board	34 Ir. L. T. 196	683
—— *v.* Millis	10 Cl. & F. 534	705

		PAGE
Reg. *v.* Pinder	24 L. J. (Q. B.) 148	636
—— *v.* Whitfield	15 Q. B. D. 122	637
Regina d'Italia, The	Unreported	459
Religious Tract and Book Society of Scotland *v.* Forbes	3 Tax Cas. 415	12
Rex *v.* Pagham Commissioners of Sewers	8 B. & C. 355	397
—— *v.* Syme	24 Cox C. C. 502	814
—— *v.* Trafford	1 B. & Ad. 874	399
Richard de Larrinaga *v.* Admiralty Commissioners	[1920] 1 K. B. 700; [1920] 3 K. B. 65	102
Richmond, The	5 C. Rob. 325	490
Rijn, The	[1917] P. 145; [1919] A. C. 540	778
Ringende Jacob, The	1 C. Rob. 89.	490, 755, 805
Rivett-Carnac's Will, In re	30 Ch. D. 136	598
Robinson *v.* Canadian Pacific Railway Company	[1892] A. C. 481	704
Robinson Gold Mining Company *v.* Alliance Insurance Company	[1904] A. C. 359	102
Roumanian, The	[1916] 1 A. C. 124	786
Rover *v.* South African Breweries	[1918] 2 Ch. 233	172
Ruding *v.* Smith	Hagg. Con. 371	706
Ryder *v.* Wombwell	L. R. 4 Ex. 32	668
Rylands *v.* Fletcher	L. R. 3 H. L. 330	529

S.

St. Catherine's Milling and Lumber Company *v.* The Queen	14 App. Cas. 46	402, 417
St. Helena, The	1 Br. & Col. P. C. 618	756
Sans Pareil, The	[1900] P. 267	236
Sarah Christina, The	1 C. Rob. 237	488, 757
Sassoon *v.* Western Assurance Company	[1912] A. C. 561	616
Saxby *v.* Easterbrook	3 C. P. D. 339	369
Scarf *v.* Jardine	7 App. Cas. 345	285
Scott *v.* Scott	[1913] A. C. 417	638
—— *v.* Stansfield	L. R. 3 Ex. 220	639
Scott-Chisholme *v.* Brown	20 R. 575	376
Sechs Geschwistern, The	4 C. Rob. 100	775
Séminaire de Québec *v.* Limoilou Corporation	[1899] A. C. 288	292
Sharp *v.* Wakefield	[1891] A. C. 173	638
Shaw *v.* Gould	L. R. 3 H. L. 55	152
Shepherd *v.* Harrison	L. R. 7 H. L. 116	491
Shuttleworth's Case	9 Q. B. 651	687
Sigurd, The	[1917] P. 250	459
Skeate *v.* Slaters	[1914] 2 K. B. 429	669
Smiles *v.* Australasian Mortgage Company	2 Tax Cas. 367	43
Smith *v.* The Queen	3 App. Cas. 614	637
Smurthwaite *v.* Hannay	[1894] A. C. 494	447
Smyth *v.* St. Albans (Bishop)	Not reported	817
Staadt Embden, The	1 C. Rob. 26.	488
Stanley *v.* Western Insurance Company	L. R. 3 Ex. 71	304
Stevenson *v.* Rollitt	Q. R. 42 S. C. 322	301
Stewart *v.* Steele	5 Scott, N. R. 927.	190
Stigstad, The	[1919] A. C. 279	463

		PAGE
Stoomvaart Maatschappij Sophie H. *v.* Merchants' Marine Insurance Company	122 L. T. 295; 36 Times L. R. 73	134
Strong & Co. *v.* Woodifield	[1906] A. C. 448	83
Sturge and Great Western Railway Company	19 Ch. D. 444	609
Südmark (No. 2), The	[1918] A. C. 475	442
Sugden *v.* Leeds Corporation	[1914] A. C. 483	12

T.

Taaffe *v.* Downes	3 Moo. P. C. 36n.	640
Tactician, The	[1907] P. 244	219
Tenant *v.* Goldwin	1 Salk. 360	525
Theodore H. Rand, The	12 App. Cas. 247	581
Thomas *v.* Quartermaine	18 Q. B. D. 685	529
Thompson *v.* Schmidt	56 J. P. 212	636
Tillmanns & Co. *v.* Steamship Knutsford	[1908] 1 K. B. 185	446
Tozer *v.* Child	7 E. & B. 377	640
Tozier *v.* Hawkins	15 Q. B. D. 650	370
Trafford *v.* Boehm	3 Atk. 440	42
——— *v.* The King	8 Bing. 204	395
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	409
Twee Gebroeders, The	3 C. Rob. 162	478
Tweeddale's Trustees *v.* Tweeddale	8 F. 264	597
Tyrie *v.* Fletcher	2 Cowp. 666; 2 Doug. 784	132

U.

United States, The	[1917] P. 30	778
——— *v.* The Etta	4 Am. L. R. (N. S.) 387	743
Urna, The	[1920] A. C. 899	765

V.

Vaillancourt *v.* Lafontaine	11 Low. Can. Jur. 305	705
Valesquez, The	L. R. 1 P. C. 494	219
Vrow Anna Catharina, The	5 C. Rob. 15.	478
Vrow Elizabeth, The	5 C. Rob. 2	736
Vrow Margaretha, The	1 C. Rob. 336	488, 777

W.

Wanless *v.* Lancashire Insurance Company	23 Ont. A. R. 224	306
Waring *v.* Waring	6 Moo. P. C. 341	636
Warrender *v.* Warrender	2 Sh. & M. 154; 2 Cl. & F. 488	149
Watson *v.* Daily Record (Glasgow)	[1907] 1 K. B. 853	369
Way's Trusts, In re	2 D. J. & S. 365	378
Weldon *v.* De Bathe	14 Q. B. D. 339	636
——— *v.* Semple	The Times, July 29, 1884	636
——— *v.* Winslow	13 Q. B. D. 784	636
Welsh *v.* Duckworth	18 Times L. R. 633	667

		PAGE
Werle *v.* Colquhoun	2 Tax Cas. 402	45
——— *v.* ———	20 Q. B. D. 753	67
Whalley *v.* Lancashire and Yorkshire Railway Company	13 Q. B. D. 131	395
Wheeler *v.* Phœnix Insurance Company	203 N. Y. 283	306
Whiddart *v.* Chislet Colliery Company	13 B. W. C. C. 157	330
Whorwood, In re	34 Ch. D. 446	598
Wickes *v.* Clutterbuck	2 Bing. 483	638
William, The	6 C. Rob. 316	441
Winans' Case	[1904] A. C. 287	161
Winspear *v.* Accident Insurance Company	6 Q. B. D. 42	104
Winterbotham *v.* Sibthorp	[1918] 1 K. B. 625	669
Wise *v.* Dunning	[1902] 1 K. B. 167	688
Wood *v.* Woad	L. R. 9 Ex. 190	637
Wynn *v.* Bangor (Bishop)	2 Com. 601	814

Y.

Yelverton *v.* Yelverton	1 Sw. & Tr. 574	159

Z.

Zamora, The	[1916] 2 A. C. 77	459, 737

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

COMAN . . . . . APPELLANT;

AND

GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN . . . . . } RESPONDENTS.

H. L. (I.)*
1920
May 13.

Revenue—Income Tax—Assessment—Exemptions—Charity—Hospital—Profits from letting Rooms for Entertainments—Application of Profits to Charitable Purposes—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 60 *and* 61, *Sch. A; No. VI., s.* 100, *Sch. D; Cases* 1 *and* 6, *s.* 105—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *ss.* 2, 5, 13.

The Governors of a hospital let out certain rooms contiguous to the hospital for entertainments for periods varying from one night to six months at charges which included the use of heating and seating and applied the profits arising from these lettings to the general support of the hospital:—

Held, that these profits were assessable to income tax under Sch. D as being profits arising from a concern in the nature of trade within

---

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (I.)
1920
COMAN
v.
GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

Case 1, and were not within any of the exemptions conferred by the Income Tax Acts by reason of their being applied to charitable purposes or otherwise.

Decision of the Court of Appeal in Ireland reversed.

APPEAL from an order of the Court of Appeal in Ireland affirming an order of the King's Bench Division upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts at the instance of the respondents, the Governors of the Rotunda Hospital, Dublin.

The facts are fully set out in the opinion of the Lord Chancellor but the following summary of the case stated by the Commissioners may be useful :—

The respondents appealed against assessments made upon them under Sch. D of 16 & 17 Vict. c. 34 in respect of the profits derived from the letting of a building known as the Rotunda Rooms for years ending April 5, 1912, 1913, 1914 and 1915 respectively.

The Rotunda Hospital was established by Royal Charter in 1756 for the relief of poor lying-in women. The Rotunda Rooms were built in pursuance of a power in that behalf conferred on the governors of the hospital by byelaws made in 1786, and special regulations were made for the management of the rooms. The rooms, which were connected with the hospital proper by an internal passage, were let by the respondents for entertainments, concerts, cinema shows, etc., for periods varying from one night to six months—the letting price including the use of heating and seating. Further charges were made for gas and electric light in accordance with the consumption as shown by the respective meters.

The respondents contended that all profits derived from the lettings of the Rotunda Rooms were—in accordance with the intention of the Royal Charter—applied to the general support of the hospital and that the moneys received from the temporary lessees or occupiers of the rooms were rents and profits of tenements belonging to a hospital within s. 61, No. VI., Sch. A, of the Income Tax Act, 1842, as extended and applied to Ireland by s. 5 of the Income Tax Act, 1853, and

that these moneys, so far as they were applied to charitable purposes, were exempt from income tax.

The Crown contended that no exemption existed under s. 61 in respect of rents and profits of tenements in the occupation of the owner; that, admitting that the rents from letting the Rotunda Rooms were applied to charitable purposes, the respondents were carrying on a concern the profits of which were assessable to income tax under the First Case, Sch. D, and that the exemption granted by s. 105 of the Income Tax Act, 1842, did not extend to trading profits, even though such profits were applied to charitable purposes. In arriving at the quantum of liability the Surveyor of Taxes was prepared to allow the net annual value of the Rotunda Rooms—250*l.*—as a deduction in arriving at the profits assessable under Sch. D and also certain further deductions for repairs and working expenses, and assuming that the profits in question were held to be assessable, the figures were agreed as set forth in para. 7 of the case. The Commissioners, having considered the facts and contentions set forth in the case, were of opinion that the profits derived from letting the Rotunda Rooms were assessable to income tax under Sch. D, and they therefore reduced the assessments to the sums set forth in para. 7.

The Divisional Court by a majority (Kenny, Madden and Gibson JJ., Campbell C.J. dissenting) held that the respondents were not liable to be assessed under Sch. D in respect of the receipts from letting the Rotunda Rooms and that the decision of the Commissioners was erroneous in law.

The Court of Appeal by a majority (Ronan and Molony L.JJ., O'Connor M.R. dissenting) affirmed this decision.

1920. April 19, 20, 22, 23. *Sir Gordon Hewart A.-G.* and *S. L. Brown K.C.* (of the Irish Bar) (with them *Reginald Hills* (of the English Bar) and *G. W. Shannon* (of the Irish Bar)) for the appellant. The profits made by the respondents from the letting of the Rotunda Rooms are assessable under Sch. D, either within the First Case as profits or gains of a trade, adventure, or concern in the

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

nature of trade or within the Sixth Case as profits or gains not falling under any other rules and not charged by virtue of any other schedules. The question whether the letting of these rooms constitutes a concern in the nature of trade is a question of fact which has been decided by the Commissioners in favour of the Crown and there was evidence to support their finding; and apart from that finding this letting did in fact constitute a trade: *Malcolm* v. *Lockhart* (1); *Carlisle and Silloth Golf Club* v. *Smith* (2); *Grove* v. *Young Men's Christian Association.* (3) The profits, if made, are not exempt as being applied to charitable purposes under s. 105 of the Income Tax Act, 1842, or at all; trading profits are not an annual payment within the meaning of that section: *Trustees of Psalms and Hymns* v. *Whitwell.* (4) These premises are not public buildings belonging to a hospital within the second branch of Sch. A, No. VI., "Allowances," nor are these profits rents and profits of lands or hereditaments belonging to a hospital within the third branch of No. VI., for the property is in the occupation of the respondents. *Ex parte Essex Hall* (5), which followed *Maughan* v. *Free Church of Scotland* (6), is precisely this case. If the letting of these rooms does not constitute a concern in the nature of trade, these profits fall under the Sixth Case of Sch. D.

Jellett K.C. and *Gerald Fitzgibbon K.C.* (with them *Arthur V. Mathieson*) (all of the Irish Bar) for the respondents. 1. This undertaking is one statutory unit, one charitable indivisible trust, and before considering its liability to income tax it is necessary to ascertain whether there is a profit on the entire statutory unit. 2. The moneys received by the respondents for the use of these rooms represent profits arising from lands, tenements, and hereditaments, and as such are assessable under Sch. A alone. 3. These rooms and the moneys received in respect of them are exempted from taxation under Sch. A either because the rooms are premises belonging

(1) [1919] A. C. 463, 466.
(2) [1913] 3 K. B. 75, 80.
(3) (1903) 88 L. T. 696; 4 Tax Cas. 613.
(4) (1890) 3 Tax Cas. 7, 10.
(5) [1911] 2 K. B. 434, 438, 441, 444.
(6) (1893) 30 S. L. R. 666; 3 Tax Cas. 207.

to the hospital—or, if the word "public" in the second branch of No. VI. applies to "offices and premises" as well as to "buildings," because they are public premises belonging to the hospital—or because the receipts are profits of lands, tenements, hereditaments or heritages belonging to the hospital and are applied to the charitable purposes of that hospital. 4. If there was any profit on the seating and heating considered per se the amount has not been ascertained and there are no materials for its assessment. 5. The fact of liability under Sch. D has not been found by the Commissioners. All that they have said is that in their opinion on a certain state of facts that result follows, and in these circumstances it is open to the Court to say whether the evidence justified the conclusion of the Commissioners: *Gramophone and Typewriter* v. *Stanley*. (1) 6. In any event this is not a trade, manufacture, adventure, or concern in the nature of trade within the First Case of Sch. D. 7. The Sixth Case excludes from its operation anything charged by virtue of any other schedules, and accordingly, as this profit is charged (and exempted) by Sch. A, it cannot come under the Sixth Case of Sch. D.

The intention of the Legislature was to exempt hospitals and everything belonging to them from liability to income tax. The decision of the Master of the Rolls in the *Essex Hall Case* (2) does not apply to the rents and profits of a hospital at all and his judgment contains not one word about casual lettings. The judgment of Buckley L.J. implies that if Essex Hall had been a hospital the exemption claimed in respect of the casual letting of portions of the premises would have been granted, and he points out the extraordinary results which must follow from the decision to which he was constrained to come. It is an anomaly that if the owner gets a tenancy of the property he is exempt from taxation but if he puts in a licensee on the same terms he is liable. Why should this particular income and that alone be made liable—more especially when it is specifically dedicated to the purposes of the hospital? Beyond a dictum of Kennedy L.J., which was

(1) [1908] 2 K. B. 89, 95. (2) [1911] 2 K. B. 434.

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

obiter only, there is nothing in that case which affects the present question.

[They also referred to *Income Tax Commissioners* v. *Pemsel* (1); *Armstrong* v. *Valuation Commissioner* (2); *Coltness Iron Co.* v. *Black.* (3)]

S. L. Brown K.C. in reply. It is said that this is one charitable trust, that the liability to income tax must be assessed on that footing, and that that liability is exhausted by Sch. A. But *Grove* v. *Young Men's Christian Association* (4) is a decision to the contrary. The proceeds of a business are not the less so because they are applied to charitable purposes. As regards the claim to exemption, nothing is exempted from Sch. A except what is contained in Sch. A. If there is an additional element of profit, that is outside Sch. A and is therefore outside the exemption. The case for the Crown does not depend upon the decision in the *Essex Hall Case.* (5)

The House took time for consideration.

1920. May 13. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal in Ireland dated February 28, 1919.

The Commissioners for the Special Purposes of the Income Tax Acts had, on an appeal by the present respondents, held that they were liable to be assessed to income tax under Sch. D in respect of their profits from letting the Rotunda Rooms, Dublin.

The respondents appealed by way of case stated to the King's Bench Division (Revenue Side) and that Court by order dated February 28, 1918, reversed the decision of the Commissioners, and this reversal was affirmed on appeal to the Court of Appeal.

The assessments in dispute are four in number and relate to the four years ending April 5, 1915. The facts proved or admitted at the hearing before the Special Commissioners are set out in the case stated and the documents annexed to it.

(1) [1891] A. C. 531, 588–9.
(2) [1905] 2 I. R. 448.
(3) (1881) 6 App. Cas. 315.
(4) 4 Tax Cas. 613.
(5) [1911] 2 K. B. 434.

The respondents are a corporation incorporated in the year 1756 for the purpose of conducting a hospital for poor lying-in women. The Letters Patent (Appendix, pp. 9 et seq.) appear to be in the nature of an exemplification. They are dated 1766, when George II. had been dead six years. From internal evidence the incorporation appears to have been by Letters Close dated July 26, 1756. The date, December 2, 1756, given by the parties and most of the judges is without any warrant.

The hospital is at present a maternity and gynæcological hospital, and as such is clearly a charity. The hospital is managed in accordance with the charter and byelaws made under the authority of the charter and an Irish Act (25 Geo. 3, c. 43), and also certain resolutions passed from time to time by the governors and collected together.

The premises occupied by the respondents at Dublin consist of the hospital, the Rotunda Rooms and the Rotunda Gardens. The vaults under the building are separately let. The hospital and the rooms are connected by an internal passage way, but it does not appear that the rooms are used for any hospital purposes, save that of earning profits which are applied towards the maintenance of the hospital. The Rotunda Rooms are in a building and consist of a number of rooms suitable for public entertainments of various kinds. There is a large proscenium, and all the rooms are equipped with platforms, seats, and proper fixtures and fittings to enable them to be lighted and heated.

They appear to have been erected towards the end of the eighteenth century in pursuance of Byelaw XX. with the avowed object of obtaining funds for the support of the charity.

By Resolution X. the general management and superintendence is entrusted to the Registrar who is responsible for the revenue derived from letting the rooms for which he accounts in the manner prescribed by Resolution XVII. The rooms are in the immediate care of the keeper of the rooms who by Resolution XIX. is responsible for the cleaning, etc., of the rooms and for the due and orderly behaviour of the persons resorting to them. He is entitled for his own and the

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. — Lord Birkenhead L.C.

attendants' services to charge in accordance with a fixed scale, and from the terms of the resolution it would appear that he has charge of certain furniture which may or may not be required for the use of the rooms and presumably is placed there when required and removed when no longer required. The Registrar makes the arrangements for letting, the charges for which are made in accordance with a scale, which may, however, be relaxed on certain consents being obtained. There is a printed form of agreement which however was not put in evidence. Gas and electricity must be paid for, but not heating.

It is clear from these facts that the lettings, which may be for the day, week or month, are not such as to constitute the relation of landlord and tenant, but that the possession and occupation of the rooms remains in the respondents who afford the hirers not merely a right or licence to use the rooms, but also fixtures and fittings some of which are clearly not part of the building but are separate chattels, and the respondents provide certain services, such as heat, light and attendance.

The moneys so received yield profits which form no inconsiderable part of the revenue of the respondents and the question which your Lordships have to decide is whether these profits are covered by the valuation and assessment of the premises for the purpose of Sch. A of the Income Tax Acts, or whether such profits are something not so covered and may properly be assessed under one or other of the cases of Sch. D.

The law relating to income tax is not quite the same in Ireland as in Great Britain. The former country was excluded from the Income Tax Act, 1842, and was first included by s. 5 of the Income Tax Act, 1853, and s. 13 of this Act provided that in Ireland assessments for the purposes of Sch. A should be made upon the Poor Law valuation of the premises in question in any case. The Valuation (Ireland) Act, 1852, s. 11, requires such valuation to be made on an estimate of the net annual value, that is to say, "the rent for which, one year with another, the same might in its actual state be reasonably expected to let from year to year, the probable average annual

cost of repairs, insurance, and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes, and public charges, if any, (except tithe rent-charge), being paid by the tenant." By s. 2 of the Valuation (Ireland) Act, 1854, the Committee of Valuation are to "distinguish all hereditaments and tenements, or portions of the same . . . . used for charitable purposes . . . . and all such hereditaments or tenements, or portions of the same, so distinguished, shall, so long as they continue to be . . . . used for the purposes aforesaid, be deemed exempt from all assessment." Until 1915 the Rotunda Rooms had been scheduled as exempt in the Valuation List and accordingly were not assessed for rating or Sch. A purposes. The assessments now under review are in respect of the four tax years ending April 5, 1915, during which no assessment under Sch. A was in fact made, but the respondents have not been prejudiced thereby, as the Special Commissioners in adjusting the respective amounts of assessment have allowed the amounts of assessable value under Sch. A.

The contention on behalf of the appellant can be stated very concisely. In effect, it is said: The respondents carry on a trade or a concern in the nature of a trade, and that is found as a fact in the case stated, or at least, is the only conclusion that can be deduced either as a matter of law or as an inference of fact from the case. He points out that the sole object of the rooms, as shown by Byelaw XX. and the Annual Reports, is to afford revenue; that the course adopted to procure such revenue is not a course adopted on special occasions but a regular habitual course of business. The respondents, it is said, retain control of the premises, select the persons to whom the user is granted and regulate the conduct and behaviour of the persons allowed to resort thereto, and for the purpose of enabling or facilitating the making of contracts for such user they have properly fitted up the rooms with fixtures, fittings and other things, some at least being clearly chattels, and provide attendance and other services. Such utilisation of property, it is claimed, goes far beyond the scope of Sch. A. Even if not a trade or concern in the nature

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Birkenhead L.C.

of trade within Case 1 of Sch. D, then it is argued that the profit obtained is not taxed by any other schedule and comes within the dragnet provided by Case 6 of Sch. D. The argument is reinforced by this illustration. Assuming that the respondents had let the rooms to a tenant who paid the Sch. A valuation and utilised the premises in exactly the same way as the respondents, then in such case it could not be contended that his profit was within the ambit of Sch. A, nor would it be contended that such a tenant would not be carrying on a trade or concern in the nature of trade, much in the same way as persons earn a living by letting furnished apartments.

The contentions of the respondents were necessarily much more elaborate and detailed, and from them I deduce the following series of propositions, which I think accurately sum up the objections in point of law to the assessments now under review :—

1. That the respondents are a single statutory corporation constituting an indivisible charitable trust, and that, before considering the question of liability to income tax, it must first be ascertained whether the respondents make a profit on the results of their activities, taken as a whole. Therefore, as the respondents' accounts show a deficit, no assessment can be justified under any schedule.

2. That all moneys received by the respondents in respect of the use of the Rotunda Rooms are assessable under Sch. A alone.

3. That these rooms and the moneys so received are exempt from taxation under Sch. A for one of two reasons : either because they are public buildings belonging to a hospital, or, if the word " public " does not apply, they are premises belonging to a hospital ; or else because the moneys are rents and profits of lands, tenements or hereditaments belonging to a hospital and applied to charitable purposes. In other words, that these premises and moneys are within No. VI. of Sch. A (Income Tax Act, 1842, s. 61).

4. That if there were any profit derived from the use of the seating and heating considered per se, the amount of such

profit has not been ascertained and there are no materials upon which an assessment can be made.

5. That there has been no finding of fact by the Special Commissioners that there is a liability under Sch. D. They have merely stated that in their opinion, if a certain state of facts existed, it would follow that such liability would arise.

6. That in any event what is done by the respondents does not constitute a trade, manufacture, adventure or concern in the nature of trade.

7. That, as Case 6 of Sch. D in terms excludes from its operation any moneys charged by virtue of any of the other schedules, and as the receipts under consideration can only be charged under Sch. A by which they are exempted from taxation, no assessment can be made under Case 6 of Sch. D.

My Lords, I do not accept any of these propositions.

If the first proposition were an accurate statement of the principle of law applicable, then in my opinion at this stage of the history of the Income Tax Acts it would have been so well established that no argument would be necessary to establish it, and no objection could or would be made to the contrary.

In my judgment the proposition is contrary to the whole scheme of the Acts and to the cases which have been decided under the Acts.

Income, for the purposes of taxation, is not ordinarily aggregated. It is grouped according to the source from which it is derived. Without saying that aggregation of income for income tax is never permitted (for that would in some cases be contrary to the Acts themselves), I am clearly of opinion that a composite assessment of the kind which would be necessary in this case would not only be entirely novel, but difficult if not impossible to reconcile with the rules applicable to the different schedules. In the case of a charity, some income may be exempted from taxation by virtue of s. 61 of the 1842 Act, other income by virtue of s. 105. In order to secure those exemptions, the income in question must be separated and regarded as severable items assessed to income tax upon a basis which varies according to the schedule or to the case

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Birkenhead L.C.

of the schedule applicable. This consideration applies not merely to charities, but to many other cases of allowance, exemption and abatement occurring in these Acts, and there is frequently a clear difference of treatment according to the source of the income, so that in many cases a loss is not set off against a profit. For example, in the *Religious Tract and Book Society of Scotland* v. *Forbes* (1) it was held that the appellant society which carried on a religious colportage and a bookseller's business could not set off the profits of the latter against the losses of the former, as the colportage was not a trade or business. Again the Young Men's Christian Association, which is a philanthropic institution running classes, gymnasia, etc., and also conducting on ordinary business lines a restaurant open to the general public, was held not to be entitled to deduct the losses on the classes, etc., from the profits of the restaurant: *Grove* v. *Young Men's Christian Association.* (2) The *Carlisle and Silloth Golf Club* v. *Smith* (3) also shows that an activity which is outside the ordinary functions of a club will, if resulting in profit, be taxable whatever may be the result shown by the accounts taken as a whole, and retention of tax such as that in question in *Sugden* v. *Leeds Corporation* (4) cannot be properly allowed unless the source of income be very carefully examined and dealt with as a separate item. The proposition when examined really amounts to no more than this: that the whole income, including the profits now under consideration, is being devoted to charitable purposes, but that fact cannot alter the effect of the rules under the schedule applicable to the particular income. If Sch. A applies, then s. 61 confers the allowances there mentioned, but, if Sch. D applies, then such exemption as exists is conferred by s. 105 of the Act of 1842.

The second proposition assumes that the profits are in respect of the property in the Rotunda Rooms, but this provision of Sch. A clearly shows that the object is to tax what for the sake of brevity may, with substantial accuracy, be called the landlord's income. Over and above that income, there is

(1) (1896) 3 Tax Cas. 415.
(2) 4 Tax Cas. 613.
(3) [1913] 3 K. B. 75.
(4) [1914] A. C. 483.

almost without exception a user of the premises whereby a further or tenant's profit is sought to be made. It is for that purpose that Sch. B is directed to tax the benefit of occupation where the land or tenement is not occupied as a dwelling or warehouse or for the purpose of carrying on a trade or business, the profits of trade or business being assessed under Sch. D. The case finds the facts in such a way as to leave no doubt that there is a profit above what may be described as the Sch. A or landlord's profit, and it is, I think, clear that No. III. of Sch. A cannot in any way be said to apply to this case.

Thirdly, I do not think that much assistance can be derived from an examination of the allowances under Sch. A. They cannot in any way affect the present assessments which are under Sch. D. For the same reason I do not propose to discuss the *Essex Hall Case* (1) which was dwelt upon so much in the course of the argument. The assessment in question there was an assessment under Sch. A, and that case therefore has no bearing on the present issue. The dictum of Kennedy L.J. is in point, but it was obiter. If Sch. A alone applies, then that case would be relevant to any question arising on an assessment under that schedule. The issue before your Lordships is whether these assessments, made under Sch. D, are valid assessments.

Fourthly and fifthly, the seating and heating are not the only matters to be considered, and to treat the user of the premises in this way is not the proper method to adopt. The question is whether the utilisation of these rooms and the provision of facilities and services in the way set out in the case, yielding, as it does, a regular annual income to the respondents above the letting value as a property and over and above the profit assessable to Sch. A, amounts either to the carrying on of a trade or business under Case 1 of Sch. D, or to a profitable activity which is assessable under Case 6 of that schedule. The provision of seating and heating is part of the whole of the circumstances upon which the determination of the real question depends. It is true that the Special

(1) [1911] 2 K. B. 434, 444.

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Birkenhead L.C.

Commissioners have not expressly stated whether they found that Case 1 or Case 6 applied, but having regard to the contention of the Surveyor of Taxes, as set out in para. 6 of the case stated, I think it is clear that they were of opinion that the respondents were in fact carrying on a business, and intended so to hold. The point however is not of great moment, as in my opinion one or other of these cases applies, and the assessments if not valid under Case 1 could in any case be supported under Case 6. The absence of precise data forming materials for assessment is not necessarily in itself an objection to an assessment, but the case clearly shows that there was evidence before the Special Commissioners upon which they came to a conclusion to which they could properly come. There is in my opinion no substance in the objection.

The sixth proposition I have in substance already rejected. It would, in my view, be impossible to say that the respondents did not carry on a trade or adventure in the nature of a trade without also excluding the business of letting furnished houses or many of the cases of letting or allowing the use of theatres, music halls and other places of public entertainment, or without overruling the *Carlisle Case* (1), which in my opinion was rightly decided.

The seventh proposition has also already been dealt with and is equally without substance.

When the facts set out in the case stated and the documents annexed to it are considered as a whole, it becomes plain that the respondents, with the laudable object of raising an income for the support of their charitable activities, have engaged in what can only be described as a business or a concern in the nature of business, and thereby have earned annual profits which are outside the scope of Sch. A. They are therefore taxable under Sch. D. No exemption conferred by the Income Tax Acts is applicable to these profits, and it follows that they are liable to income tax and that the assessments appealed against were duly made. I therefore move your Lordships to reverse the decision appealed against and to restore that of the Special Commissioners.

(1) [1913] 3 K. B. 75.

VISCOUNT FINLAY. My Lords, the Rotunda Hospital was incorporated by Royal Charter dated December 2, 1756, for the relief of poor lying-in women. The Rotunda Rooms are contiguous to the hospital and are vested in the Governors of the charity, the respondents on this appeal. The legal occupation of the rooms is and always has been in the respondents, but they are hired out by them for entertainments, concerts, cinema shows, etc., for periods varying from one night to six weeks. The rooms have a proscenium and platforms, and when they are hired out they are equipped with seats, and heating, lighting and attendance are provided by the respondents.

The respondents were assessed under the Income Tax Sch. D in respect of the profits made from the letting of the rooms thus equipped, and the Commissioners for Special Purposes stated a case for the opinion of the Court, upon which this appeal arises. Paras. 7 and 8 of the case are as follows :—

" 7. In arriving at the precise quantum of liability, the Surveyor of Taxes was prepared in the circumstances to allow the net annual value, 250*l.*, of the Rotunda Rooms (vide paragraph 4 of this case) as a deduction in arriving at the profits assessable under Schedule D. He also admitted that certain adjustments fell to be made in respect of renewals of flooring, platforms, seating and furniture—also a proportion of the general administrative salaries as applicable to the letting of the Rooms, with the result that the amended liability would be as under :—

For the year ended April 5, 1912	£223
For the year ended April 5, 1913	327
For the year ended April 5, 1914	405
For the year ended April 5, 1915	381

" The appellants agreed that if the profits in question are held to be assessable to Income Tax, Schedule D, the figures as above may be taken as correct.

" 8. Having considered the facts and contentions herein set forth we were of opinion that the profits derived from letting the Rotunda Rooms were assessable to Income Tax,

H. L. (I.) 1920

COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

Viscount Finlay.

Schedule D, and we therefore reduced the assessment to the sums set forth in paragraph 7."

The case was argued before the King's Bench Division (Revenue) of the High Court of Justice. The Court held, the Lord Chief Justice dissenting, that the decision of the Commissioners was erroneous in point of law and that the respondents were not liable to be assessed under Sch. D. The Court held unanimously: (*a*) That the respondents for the purposes of the Income Tax Acts were in legal occupation of the Rotunda Rooms, and therefore the income derived from the hirings was not "rents and profits" within the meaning of the third branch of s. 61, Sch. A, No. VI., of the Income Tax Act, 1842, so as to be thereby exempt from tax. (*b*) That if the profits were chargeable under Sch. D they would not be exempt from tax by reason of their application to charitable purposes, for the only exemption of that kind is to be found in s. 105 which is restricted to profits in the nature of "yearly interest or other annual payment." But the majority of the Court held that the rooms were assessable to income tax only under Sch. A, while the Lord Chief Justice held that the use made of the rooms brought the profits within the operation of Sch. D.

An appeal was brought, and in the Court of Appeal it was heard by the Master of the Rolls, Ronan L.J. and Molony L.J. The Court differed in opinion, the Master of the Rolls agreeing with the judgment of the Lord Chief Justice in the King's Bench Division that the profits derived from the use of the rooms were assessable under Sch. D, while the other members of the Court agreed with the majority of the King's Bench Division that they were not.

The points on which the decision of this appeal must mainly turn are whether the letting out of the rooms, with furniture, heating, lighting and attendance, constitutes a concern in the nature of a business falling within Sch. D, and whether the "Allowances" granted by s. 61 of the Income Tax Act of 1842 are applicable to such profits.

The Income Tax Acts were extended to Ireland by the Income Tax Act, 1853, s. 5, and s. 13 of the same Act provided that

the duties under Schedules A and B in Ireland should be charged on the annual value of all tenements and rateable hereditaments, according to the valuation made for the relief of the poor, with a provision for reduction on appeal if the assessment be shown to be excessive.

Sch. D extends to every description of property or profits which is not contained in either of the Schedules A, B or C, and to every description of employment of profit not contained in Sch. E, and not specially exempt from the said respective duties (Act of 1842, s. 100, Case 1). Case 1 under Sch. D is "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other Schedule of this Act." Case 6 is: "The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other Schedules contained in this Act."

Sect. 105 of the Act of 1842 provided for exemption in favour of charitable institutions in respect of any yearly interest or other annual payment chargeable under Sch. D, so far as the same is applied to charitable purposes. But it was held, and I think rightly held, in the case of *Trustees of Psalms and Hymns* v. *Whitwell* (1), that trading profits do not fall within this provision, which relates only to yearly interest or other annual payments.

Do the profits made by the letting out of the Rotunda Rooms fall under Sch. D according to the definitions to which I have referred, or, in other words, are they to be dealt with as trading profits? It appears to me that this question must be answered in the affirmative.

The rooms are hired out not merely as tenements, but with furniture, heating, lighting and attendance. The contention on the part of the respondents was that the profits fall under head No. VI.: "Allowances to be made in respect of the said duties in Sch. A" in s. 61 of the Act of 1842. This head provides for allowances to be made, inter alia, "on the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school or almshouse, or vested

(1) 3 Tax Cas. 7.

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. — Viscount Finlay.

in trustees for charitable purposes so far as the same are applied to charitable purposes." The fact that the possession remains vested in the owner and has not passed by demise to the person to whom the use of the rooms is granted would not, in my opinion, by itself prevent the right to this allowance. Sums received in respect of the use of the rooms merely as tenements would be profits of tenements within the meaning of this allowance (No. VI. under Sch. A) even in the absence of an actual demise of the rooms, for however short a period each hiring might last, and even if the legal possession still remained in the owner.

In order to fall within this allowance there must be " profits " received which are applied to charitable purposes. The receipt of such profits imports that payments are made for the use of the tenement. The allowance has no application where the tenement is merely used by the owners themselves. Such an occupation clearly does not satisfy the terms of the allowance. The benefit of such occupation cannot be applied to charitable purposes within the meaning of the allowance, as such application clearly imports that something has been received for the use of the tenement and that the sum so received is to be applied.

Profits are undoubtedly received in the present case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments, with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the Governors in respect of these entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Sch. D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors and consists in finding tenants and having the rooms so equipped as to be suitable for letting. The case

does not in substance differ from the letting of furnished apartments.

The *Essex Hall Case* (1) has no application to the present case. It was a case in which the trustees for charitable purposes of Essex Hall sought relief under the allowance now in question. They had been assessed under Sch. A in respect of their occupation of the premises. The Divisional Court were divided in opinion. Avory J. took the view which was ultimately adopted by the Court of Appeal and the following passage occurs in his judgment: "In my view this clause does not apply to a case of this sort at all. My view is that it applies to a case where a person has let out a building and is in receipt of the rent for that building, but the rent which he has received is in fact applied to charitable purposes. This is a case, it appears to me, simply of an assessment for income tax under Schedule (A) in accordance with Rule I. of the schedule. As Mr. Finlay has said, the assessment is upon the annual value of the lands which, in fact, are in the occupation of the applicants. For the purposes of this argument it is admitted that they are in occupation, and it does not appear to me to be an assessment on the rents and profits arising from lands within the meaning of Rule II., paragraph 6. They appear to me to be contemplated all through the Act as separate things altogether—one as assessment on the actual annual value of hereditaments which are occupied, and the other an assessment upon the profits derived from land in the shape of rents, which profits are coming into the hands of a person who is not in occupation. They appear to me to be two totally different things, and the exempting clause appears to me to apply only to the cases which come under Rule II. where there is an assessment made on the profits arising from lands, and does not apply to a case which comes under Rule I., where the assessment is upon the annual value of the lands which are occupied by the person assessed." His colleagues, the Lord Chief Justice and Hamilton J., differed from him, holding that the beneficial occupation by the trustees for charitable purposes constituted a case of rents and profits of tenements within the

(1) [1911] 2 K. B. 434; 5 Tax Cas. 636.

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. — Viscount Finlay.

meaning of the allowance. The Court of Appeal, consisting of the Master of the Rolls, Buckley and Kennedy L.JJ., reversed the decision of the majority of the Divisional Court, and adopted the view of the case which had been presented by Avory J. Kennedy L.J. says (1): "And, further, as I am inclined to think, the profits made in the present case by Essex Hall, the occupying owners, from use of parts of the premises are really not in their nature 'rents or profits of lands, etc.,' within the meaning of this allowance clause, but rather profits of a business, a business of letting furnished or partly furnished rooms, carried on by the occupier in the premises." Buckley L.J. said that he concurred with extreme reluctance and added: "A subsidiary question was mentioned, namely, whether Essex Hall are entitled in respect of the sums received for casual lettings, to the same allowance as has been conceded in respect of the rent received from the Inquirer Publishing Company. But this is not the subject of the appeal before us and I say no more about it." Some expressions occur in the judgment of the Master of the Rolls at p. 654 and in the judgment of Kennedy L.J. at p. 657 which might seem to import that the reason why the sums received by the trustees in respect of occasional hirings would not fall within the allowance was because the occupation always remained in the trustees. If these remarks bear this meaning I feel unable, for the reasons I have already given in the earlier part of this judgment, to agree with them. The decision really turned on the claim to treat occupation by the trustees as a case of rents and profits within the meaning of the allowance, and it has no application to the facts of the present case, which arises on the question of profits actually received by the hiring out of the rooms.

The earlier case of *Maughan* v. *Free Church of Scotland* (2) is to the same effect as the *Essex Hall Case*. The distinction between rents and profits and the buildings themselves is put with extreme clearness by the Lord President at p. 209 of the report. In that case also there were some profits derived from rents for use of the hall which amounted to

(1) 5 Tax Cas. 656, 657. (2) 3 Tax Cas. 207.

a few pounds a year, but Lord MacLaren said that he did not understand them to be the ground of assessment.

In my opinion the case of *Grove* v. *Young Men's Christian Association* (1), in which Ridley J. held a restaurant carried on by the Young Men's Christian Association to be assessable in respect of the profits of the trade there carried on, was correctly decided. The *Carlisle and Silloth Golf Club Case* (2) is another illustration of a business separate from the general objects of the club being held assessable under Sch. D. An effort was made in the present case to maintain the proposition that the letting of the Rotunda Rooms could not be treated as a separate concern in the nature of trade, but that the only subject which could be assessed would be the whole undertaking of the Governors, including the hospital. It was contended on this view that there were no profits at all, as all the receipts from the hiring out of the rooms were spent on the charity. I cannot think that this is the correct way of approaching the question. It is merely another way of saying that all the proceeds of the trade carried on in hiring out the Rotunda Rooms are devoted to the purposes of the charity. The letting out of the rooms for entertainments and other purposes is as much a separate concern in the nature of trade as was the restaurant in the case of the Young Men's Christian Association or the issuing of tickets to non-members for the use of the golf green and club in the case of the Carlisle and Silloth Golf Club.

I am of opinion that the respondents are not entitled to the allowance claimed, and the assessment made by the Commissioners should be restored.

VISCOUNT CAVE. My Lords, the respondents, the Governors of the Rotunda Hospital at Dublin, are possessed, in addition to the hospital, of certain rooms connected with it by internal passages and known as the Rotunda Rooms. These rooms are let by the Governors for concerts and other entertainments for periods varying from one night to six months ; the lettings not being of such a nature as to create a tenancy but being

(1) 4 Tax Cas. 613. (2) [1913] 3 K. B. 75 ; 6 Tax Cas. 48, 198.

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Viscount Cave.

of the nature of licences, and the legal occupation remaining with the Governors. The letting prices include the use of the movable seats provided by the Governors and the heating of the rooms, and additional charges are made to cover the cost of lighting and attendance. The prices received, after deduction of all outgoings attributable to the rooms (including a proportion of the general administrative expenses) and of a sum equal to the net annual value of the rooms as ascertained for the purpose of assessment under Sch. A of the Income Tax Acts, yield a profit which in the four financial years 1911–1912 to 1914–1915 amounted on the average to about 330*l.* per annum. The question raised by this appeal is whether these net profits are properly assessable to income tax under Sch. D.

Prima facie they are so assessable. Sch. D of the Income Tax Act, 1853, which applies to Ireland, renders taxable all "annual profits or gains" whether arising from property or from any profession, trade, employment or vocation, and all other annual profits and gains not charged by any other schedule; and there can be no doubt that these words, taken by themselves, are wide enough to cover the profits now under consideration.

It is pointed out, however, on behalf of the respondents that by virtue of the regulations contained in the Act of 1842 (which by s. 5 of the Act of 1853 are incorporated in that Act so far as consistent with its provisions), and particularly of r. 1 in s. 100, any profits liable to assessment under Sch. A are expressly excluded from Sch. D; and it is argued that the profits from the Rotunda Rooms fall within that category. Accordingly, the first question to be determined is whether these profits are assessable under Sch. A.

It is contended that they are so assessable in one of two ways —namely, either (1.) as being profits of lands, tenements, hereditaments or heritages and so falling within the general description of property comprised in Sch. A and within r. 1 in s. 60 of the Act of 1842, or (2.) as being profits of a concern of the like nature with ironworks, gasworks, and the other undertakings specified under the third heading of r. 3 in the

same section. With regard to the former of these contentions, I am unable to see how the profits in question can be said to be derived from the Rotunda Rooms alone. They result, not from the letting of bare rooms, but from the whole venture consisting of the equipment and disposal of the rooms with their fixtures and furniture, and the provision of the services of heating, lighting and attendance. They may perhaps be described as profits of a trade or concern in the nature of trade, that is to say, of the business of providing and letting rooms for entertainments, and so as falling under Case 1 in s. 100, Sch. D; but if not then they fall under Case 6 as profits or gains not falling under any of the earlier rules. In some respects they resemble profits derived from letting furnished houses or apartments, which are regularly assessed under Sch. D. It is no doubt true that a substantial part of the profits in question arises from the occupation and use of the tenements occupied for the purposes of the business; but this is precisely the event contemplated by the second of the rules contained in s. 100 and applicable to Cases 1 and 2, which provides that the computation of the duty to be charged in respect of any particular trade, manufacture, adventure or concern is to be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such trade, manufacture, adventure, or concern, and effect has been given to that rule by deducting the Sch. A assessment. It may be that in the present case the share of profits so attributed to the elements in the concern other than the rooms themselves is excessive; but, if so, that is the effect of s. 9 of the Finance Act, 1898, which provides that the sum deducted under the rule above quoted is not to exceed the Sch. A assessment. The hardship (if there be any) may be obviated by getting the Sch. A assessment increased. As to the alternative argument, that the profits in question are assessable under para. 3 of r. 3, it is sufficient to say that the undertaking in the present case cannot be held to be "of the like nature" with ironworks, gasworks, and the other concerns mentioned in that paragraph.

The result is that, in my view, the profits in question are

H. L. (I.) 1920

COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

Viscount Cave.

not assessable under Sch. A, and accordingly fall to be assessed under Sch. D.

An argument was addressed to your Lordships for the purpose of showing that the profits from the Rotunda Rooms are exempt from taxation under No. VI. of s. 61 of the Act of 1842, on the ground that the rooms are public buildings, offices and premises belonging to the hospital, or (in the alternative) on the ground that the profits are profits of hereditaments belonging to the hospital and are applied for charitable purposes; but that rule appears to me to have no bearing on this case. The exemption relied upon is confined to assessments under Sch. A; and if, as I have shown, the profits in question are not assessable under that schedule, then the exemption cannot apply to them. This being so it is unnecessary to consider the construction of the rule here referred to, or the effect of the decisions in *Maughan* v. *Free Church of Scotland* (1) and *Ex parte Essex Hall* (2), which turned entirely on the language of that rule.

It was not contended that the exemption in s. 105 of the Act of 1842, which relates to "any yearly interest or other annual payment" chargeable under Sch. D which is applied to charitable purposes, entitled the hospital to exemption in this case. It was decided in *Trustees of Psalms and Hymns* v. *Whitwell* (3) that trading profits are not an "annual payment" within the meaning of s. 105, and that decision was not challenged in this case.

As a final argument it was said that, as by the statute regulating the hospital (25 Geo. 3, c. 43) the profits in question are directed to be applied for the maintenance of the charity, the hospital with the receipts from the rooms must be regarded as one undertaking, which yields no profit and accordingly is not liable to taxation under Sch. D. It does not appear to me that this argument is maintainable. No doubt the hospital, like other charities, yields no profit; but, if the Governors in the course of their management carry on a profitable

(1) 3 Tax Cas. 207; 30 S. L. R. 666.

(2) [1911] 2 K. B. 434; 5 Tax Cas. 636.

(3) 3 Tax Cas. 7.

business, the profits of that business are subject to taxation. Upon this point I agree with the decisions in *Grove* v. *Young Men's Christian Association* (1) and *Carlisle and Silloth Golf Club* v. *Smith.* (2)

For the above reasons I am of opinion that the profits in question are properly assessable under Sch. D of the Act, and accordingly that the decision appealed from should be set aside and the decision of the Commissioners for Special Purposes restored.

LORD ATKINSON. My Lords, I concur. The facts of this case have already been fully stated. It is unnecessary to repeat them.

It would I think be well to bear in mind that, to use Lord Macnaghten's words in his celebrated judgment in *London County Council* v. *Attorney-General* (3), "Income tax is a tax on income." When the amount of the income to be taxed under the Act of 1842 and the Acts amending it comes to be measured different standards are selected, and the words "profits or gains" are used in reference to all the schedules in the Act of 1842 to describe the income, the subject of charge. The standard selected as a measure of the amount of the income to be taxed under Sch. A in respect of lands, tenements, hereditaments and heritages capable of occupation is the annual value. If the owner of such properties as these should be himself in occupation of them, it by no means follows that he will, in fact, derive from them an income equal to this annual value: but, as he has the use and enjoyment of the properties, it is, for the purposes of the statute, presumed that he does derive from them an income equal in amount to this annual value, and the tax is accordingly, under Sch. A, assessed upon this presumed income. The annual value of properties of these kinds is, in Ireland, ascertained and fixed by methods somewhat different from those applied in England for this purpose. The Income Tax was first imposed in Ireland by the Act of 1853 (16 & 17

(1) 4 Tax Cas. 613; 88 L. T. 696.
(2) [1913] 3 K. B. 75; 6 Tax Cas. 48.
(3) [1901] A. C. 26, 35.

H. L. (I.) 1920 — COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. — Lord Atkinson.

Vict. c. 34). It is entitled, just as the English Act of 1842 is entitled: "An Act for granting to Her Majesty duties on profits arising from Property, Professions, Trades, and Offices." For the purpose of classifying and distinguishing the several properties, profits and gains in respect of which the duties are granted, and assessing, raising and levying the same, these profits and gains are described in five separate schedules marked A, B, C, D and E respectively. Sch. A comprises all profits and gains "For and in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof." Sch. B comprises profits and gains in respect of the occupation of such lands, tenements, hereditaments and heritages as aforesaid, to be charged for every twenty shillings of annual value thereof. The properties comprised in these schedules correspond substantially with those comprised in Sch. A (1.) in the Act of 1842. Sch. C in the Irish Act comprises the profits arising from interest, annuities, dividends, and shares payable out of any public revenue to be similarly charged. Sch. D comprises the duties in respect of the annual profits or gains "arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains." The case of a person non-resident in the United Kingdom deriving profits and gains from any profession, trade, employment, or vocation exercised here is then dealt with, and the schedule then winds up with the following sweeping provision: "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other Schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof." This Schedule is substantially the analogue of s. 100, Sch. D, of the Act of 1842, and the last sweeping provision is analogous to Case 6 of that schedule.

By s. 5 of the Act of 1853 it is provided that the duties

thereby granted are to be assessed, raised, levied, and collected under the regulations and provisions of the Income Tax Act of 1842, and the Acts subsequently passed explaining altering amending or continuing the same, and are, as far as they may be applicable consistently with the provision of the former statute, extended to Ireland. It is not disputed, therefore, that for all the purposes of the present case the Income Tax Code of England is, save as to the matter hereinafter mentioned, substantially identical with the Irish Income Tax Code. The difference between them consists solely in the different method prescribed by s. 13 of the latter statute for ascertaining the annual values of the several kinds of property mentioned in those schedules.

These are in Ireland ascertained and fixed under the Poor Law Relief Acts in force in that country, the duties chargeable under Sch. A being made upon the landlord or immediate lessor, and those chargeable under Sch. B being made upon the occupier of the property. The valuations for the purpose of these Acts are in Ireland made under the 15 & 16 Vict. c. 63, s. 11 of which prescribes that land shall be valued in reference to the average prices named of the several agricultural products therein mentioned, and the valuation of houses and buildings is made (very much as it is in England) "upon an estimate of the rent for which, one year with another, the same might in its actual state be reasonably expected to let from year to year, the probable annual cost of repairs, insurance, and other expenses (if any) necessary to maintain it in its actual state, and all rates, taxes, and public charges, if any (except tithe rentcharge), being paid by the tenant."

It has frequently been decided that for the purpose of this valuation not only is the site of the house or building, and its quality and condition, to be taken into account, but that if some lucrative trade or business has been carried on in it then its inherent capacity (not personal to the occupier carrying on this trade or business) to secure a profit should be taken into consideration when seeking to ascertain what the hypothetical tenant would be likely to give by way of rent

H. L. (I.) 1920

COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

Lord Atkinson.

for it: for the very sufficient reason mentioned by Lord Macnaghten in *Cartwright* v. *Sculcoates Union* (1)—namely, that the volume of business done in the hereditament, and the profit thereby earned is the very first thing a tenant who was going to offer for the hereditament would take into consideration, and is one of the circumstances which would influence him when bargaining about the rest demanded from him. But the valuing for the purpose of Schedules A and B of this inherent capacity of the hereditament is a wholly different thing from including for these purposes, as part of its value, the profits gained by the use of this capacity.

The building in which a trade or business is carried on may contribute more largely to the earning of the profits of that trade in one case than in another. For instance, in a cotton mill, in which all the expensive and delicate machinery used is not only supported by, but often attached to the fabric of the building itself, the fabric helps to a much greater extent to earn the profits than where the trade carried on is that of a watchmaker, for instance, where the fabric does little more than provide shelter for the workmen. In the former case the greater inherent capacity of the building to earn the profit would cause it to be more highly valued for the purposes of Sch. A than in the latter.

The case of licensed premises forms no exception to this rule, for the licence to carry on the trade of a publican is not a licence purely personal to the publican. It only authorizes him to carry on his trade in the particular premises named: see *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (2) and *Armstrong* v. *Valuation Commissioner*. (3) Moreover, the provisions of s. 9 of the Finance Act, 1898 (61 & 62 Vict. c. 10), clearly indicate (1.) that the profits and gains themselves accruing from any trade or business carried on in any particular tenement are not to be included in the valuation of that tenement, and (2.) that the profits derived from a trade carried on in particular premises may be properly assessable under Sch. D, while the profits and gains accruing from these

(1) [1900] A. C. 150, 153. (2) [1901] A. C. 175, 180, 181.
(3) [1905] 2 I. R. 448.

very same premises themselves may be assessable under Sch. A of that statute.

Sect. 9 provides that—"Where in estimating the amount of annual profits or gains arising or accruing from any profession, trade, employment, or vocation, and chargeable to income tax under Schedule D of the Income Tax Act, 1853, any sum is deducted on account of the annual value of the premises used for the purpose of such profession, trade, employment, or vocation, the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of income tax under Schedule A to the said Act, as reduced for the purpose of collection under Section thirty-five of the Finance Act, 1894."

The course which this section prescribes was followed in the present case. The Rotunda Lying-in Hospital and Gardens being hereditaments or tenements or portions of hereditaments or tenements used for charitable purposes are exempted from liability for poor rates under the Valuation (Ireland) Act of 1854 (17 & 18 Vict. c. 8). The annual value of the concert hall and ballroom, of which the Governors are the occupiers, was fixed at 300*l.* for the purposes of Sch. A. This sum was diminished by one-sixth as prescribed in s. 35 of the Finance Act of 1894. Then, as I understand the statement in the special case, the net annual profit derived from the use of the concert hall and ballroom in the manner described was ascertained in the usual commercial manner—namely, by deducting from the receipts what it costs to earn them, and then from the amount of the net annual profit so ascertained the sum of 250*l.* was deducted. Whether the letting of the concert hall and ballroom, together with the rendering of the services connected therewith, amounted to the carrying on of a trade or employment within the meaning of Sch. D is a question of law for the decision, in the present case, of this House. If that be decided in favour of the appellants, then there does not seem to be any valid reason for disturbing the findings of the Commissioners on the questions of fact, the proper amounts to be arrived at. If it were permissible to speculate I should, however, for myself

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Atkinson.

be inclined to think that if the suitability of these rooms for the use to which they have been put, and their inherent capacity to help in winning the profits realized were properly taken into consideration, they ought to have been valued for the purposes of Sch. A at a higher value than was actually put upon them. Mr. Jellett, on behalf of the respondents, relied much on two of the allowances authorized to be made under s. 61 of the Act of 1842 in respect of the duties assessable under Sch. A—namely, first, the duties assessable on any hospital, public school or almshouse in respect of the public buildings, offices and premises belonging to such institutions, and, second, the duties on the rents and profits of lands, tenements, hereditaments and heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to these purposes. My Lords, the answer given by Mr. Brown on behalf of the appellants to this contention is, in my opinion, quite convincing. These allowances are exceptions out of Sch. A, not Sch. D. If the duties in respect of which the allowances are to be made did not come within Sch. A and be covered by it, then the words " allowances to be made in respect of the said duties in Sch. A " are meaningless. A particular thing cannot be excepted out of another thing unless it was originally comprised in that other. The question at issue in this appeal is the liability of the respondents to be charged for income tax assessed on their profits and gains under Sch. D. It may well be that if the respondents were sued for the income tax assessed upon them under Sch. A, they might be able to rely with success on these allowances, but these are matters not arising for consideration in the present appeal. The next point of importance relied upon by Mr. Jellett was that the Rotunda with its garden and all the building belonging to, or connected with it, constituted, for taxing purposes, one unit, and that if the income taxable under Sch. D was applied to discharge the debts and liabilities incurred in this charitable work, it would be found, after this pooling had taken place, that the Governors had not any profits or gains to their credit. The use made of the concert hall

and ballroom is undoubtedly very lucrative. Separate accounts can be, and have been kept of profits thereby realized, as if the letting was a separate commercial enterprise. It is quite true that these profits are ultimately to be applied to the purposes of the charity, but in no other way are these buildings made available for those purposes. The patients or staff do not use them in any way, nor indeed, as far as appears, have they access to them. If the Governors of a charitable institution, in buildings belonging to them, but forming no portion of the buildings devoted to their charitable work, choose to carry on a separate adventure or enterprise of a lucrative commercial and trade character, different and distinct from their charitable work, I fail to see upon what principle they should escape being taxed under Sch. D for the profits and gains realized by that trade or business, and I think it is not the law that they should so escape. In *Mersey Docks and Harbour Board* v. *Lucas* (1) Lord Selborne said: "To my mind it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purpose it is used, whether it is gained for the benefit of a community, or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is the same."

The case of *Grove* v. *Young Men's Christian Association* (2) has a direct bearing upon this point. There the defendant association had for its object the improvement of the spiritual, mental, social and physical condition of young men. With that view they had established educational classes, a gymnasium and a publication department. The fees charged for the work carried on in these departments were so low that they were insufficient to cover the expenses and had to be supplemented by donations and subscriptions. They had also a restaurant carried on upon ordinary commercial principles, and used not only by the persons attending the classes instructed in the above-mentioned departments, but, in addition, by those attending numerous religious meetings held at Essex Hall, by associates of the association, and by the

(1) (1883) 8 App. Cas. 891, 905. (2) 4 Tax Cas. 613; 88 L. T. 696.

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Atkinson.

general public. Should there in any year be a loss on the working of the restaurant it must be made up out of the above-mentioned subscriptions and donations. It was contended that the undertakings of the association formed one concern, that the association was consequently entitled to deduct the losses sustained in the education classes, gymnasiums and publication department from the profits made by the restaurant, with the result that their accounts would show a loss, inasmuch as the profits earned in the restaurant, amounting to 703*l.*, would not cover the losses sustained on the other branches. The appellant on behalf of the Crown contended that the association was carrying on a competing trade in the business of a restaurant and was therefore liable to be assessed under Sch. D in respect of the profits made in the restaurant and that the losses sustained in the other departments could not be set off against these profits. It was decided that the contention of the Crown was right, and that the law is that if you carry on a trade you are not to take off the losses connected with something else which you do, however philanthropic and however desirable, from the profits you make in that trade. This decision was based very much on the decision in the Scotch case of the *Religious Tract and Book Society of Scotland* v. *Forbes*. (1) In that case a colportage society, founded for the diffusion of religious literature, sold Bibles and other religious books at a depository shop in Edinburgh, and sent out colporteurs into the country whose duty it was to sell Bibles and also to act as cottage missionaries. The sales in Edinburgh resulted in a profit, the colportage in a loss, the net result of the whole operations resulted in an annual loss which was met by subscriptions. It was held that colportage was not a trade, and that the loss on it could not, for the purpose of income tax, be set off against the profits from the bookseller's business carried on in the shop. Lord McLaren in delivering judgment said (2): "It appears to me . . . . that these two branches of the society's operations cannot be identified as one and the same trade, adventure, or concern, and, therefore, that under the third rule for

(1) 3 Tax Cas. 415. (2) Ibid. 420.

estimating profits under Sch. D the society is not entitled to set off the loss arising from the colportage business in reduction of the profits upon which they fall to be assessed for their commercial business. The two being clearly separable, I think income tax is payable upon the remunerative part of the society's business."

The case of the *Carlisle and Silloth Golf Club* v. *Smith* (1) is a most important authority bearing directly on the present case. In it the Golf Club had obtained from the North British Railway Co. a lease of the lands upon which the links were formed and the club house erected. This lease contained a provision that members of the public not members of the club, nor introduced by any member of the club, and not being persons of any particular class should, by the lessees, be permitted to play upon the links and to use the Golf Club house on payment of the green fees fixed by the lessors. The total annual expenditure incurred by the club in keeping the links in a fit condition for play exceeded the total amount of fees received from the visitors. Hamilton J., as he then was, on the hearing before him held that the Golf Club, in permitting these non-members to play upon the links and use the Golf Club house on the terms mentioned, were carrying on an enterprise which was, in itself, outside the scope of the ordinary functions of the club, and distinct from its ordinary objects and activities, as to which it was possible to keep separate accounts so as to ascertain whether there were any profits thereby realized, and that any profits derived from the green fees were therefore taxable under Sch. D of the Act of 1842. In the course of his judgment he said (2): "In my judgment, therefore, the club has, for considerations sufficient in its own view, annexed to its ordinary enterprise of a golf club systematic services to strangers for the purpose of obtaining . . . . the revenue that those strangers provide. It is not a case where, owing to relations of membership or family bonds, persons club together and reduce the common expenditure on some common object by contributions which they fix

(1) [1912] 2 K. B. 177; [1913] 3 K. B. 75.
(2) [1912] 2 K. B. 187.

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Atkinson.

roughly with some reference to the cost. It is not a case in which the members as an aggregate (for they are not incorporated) dispose of their surplus because they have no necessity to consume it, but it is a case in which this aggregate of gentlemen, who may for practical purposes be treated as one person, have annexed to their club for the purposes of recreation an enterprise which is separate from it and which results in pecuniary receipts to themselves."

That decision came on appeal before a Court of Appeal composed of Cozens-Hardy M.R. and Buckley L.J. (as they then were) and Kennedy L.J. (1) The Master of the Rolls in giving judgment said: "It seems to me that there is a real difference between moneys received from members and applied for the benefit of members and moneys received by the club from strangers. I cannot draw any distinction between gate moneys . . . . and green moneys. In each case the club would be assessable. Whether there have been any profits or gains is a matter of fact; and the answer will depend upon the mode in which the expenses of maintenance and other outgoings ought to be attributed to the visitors." Buckley L.J. said: "I agree as well in the reasoning as in the conclusion pronounced by Hamilton J. . . . . If it were necessary (which it is not) to decide whether the club were carrying on 'an adventure or concern in the nature of Trade,' I am of opinion that they were. To determine this question it is not the character of the person who carries on but the character of the concern which is carried on that has to be regarded. If a landowner laid down upon his land a golf course and charged fees for admission and user—if, that is to say, the links were a proprietary golf links carried on with a view to profit—there can be no question but that the proprietor would be assessable. The adventure of maintaining golf links and charging for the use of them is an 'adventure or concern in the nature of trade.' If other conditions therefore are satisfied the club are, I think, assessable under the first rule of Sched. D. But as I have already said, it is, I think, unnecessary to determine whether that is so or not,

(1) [1913] 3 K. B. 80, 81, 83.

for if it were not a 'concern in the nature of trade,' yet, other things being satisfied, the club would be made assessable under the sixth rule. Further, the question is not whether the members of the club are making profit but whether the fraternity or society chargeable under s. 40 of the Act of 1842 are making profit by the concern in question. The appellants laid great stress upon the fact that the expenses in a year exceed the amount received from green fees from visitors. That fact seems to me irrelevant upon the question whether the club are assessable." Kennedy L.J. said: "Upon the facts appearing in the case, it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf, and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment." Adapting the language of Kennedy L.J. to the present case, the Governors of the Rotunda are, in my opinion, engaged in the business of letting for reward their rooms heated, lighted and furnished with seats in the manner described in para. 3 of the case stated, and cleaned, managed and regularly controlled by their servant, the keeper, as prescribed by Regulation XIX., for the purpose of providing through the operations of those who take their rooms, recreation and amusement to such members of the general public as choose to pay for admission.

I do not think the services thus rendered can be regarded as mere incidents attached to the letting of the rooms themselves. What is let, paid for and used is the room plus the services as constituting one composite whole, for which money is paid, and is obtained from the general public. In my opinion this letting is an "adventure or concern in the nature of trade" within Case 1, r. 1, Sch. D, but, even if not, the profit and gains derived from it are assessable under Case 6 of that schedule.

If the Governors, instead of letting their rooms equipped and watched over, and attended to as they have been, leased them to a lessee who was bound to use, let, equip and manage

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Atkinson.

them as they themselves have done, I do not think it could be contended that the lessee would not be liable to be assessed under Sch. D for the profits and gains he acquired by obeying the provisions of his lease. I do not think it can make any real difference if the Governors themselves do these things instead of binding their lessee to do them. For the reasons given by the noble Lords who have preceded me I do not think that the *Essex Hall Case* (1) has any application to the present case. In my opinion the appeal succeeds, the decision appealed from should be reversed, and the decision of the Commission mentioned in para. 8 of the case stated should be adjudged to have been right in law.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. The facts of this case and the statutes and decisions bearing thereon have been so fully and clearly brought under your Lordships' notice by my noble and learned friend Lord Atkinson that I hesitate to express any separate opinion; more particularly as the case does not appear to me, once those facts and statutes have been expiscated, to present any serious difficulty.

I may say, my Lords, that I agree in the results of the judgment of the learned Lord Chief Justice and the learned Master of the Rolls, and substantially with the reasons which those learned judges gave for those conclusions. But there are two passages, one relating to fact, and the other on the point of law in issue, which I venture to extract from the judgment of the Master of the Rolls as expressing my own opinion.

The facts as to the letting of the Rotunda concert and ball-rooms are thus stated by the learned judge: "Reference to the bye-laws shows that the subject-matter of the hirings or lettings is not bare rooms, but rooms with seating and heating. In addition the Governors undertake the lighting of the rooms by gas or electricity at certain charges according to consumption. There is further an officer of the Governors, called the Keeper of the Rotunda Rooms, whose duty it is to prepare the rooms for all entertainments and to see that no

(1) [1911] 2 K. B. 434.

smoking or improper conduct is permitted at any entertainment or meeting. He is further bound to remain constantly on the premises and to be attentive and accommodating to all parties occupying the rooms. He is also bound to attend to the lights and fires, and he is entitled personally to receive for his services certain prescribed charges from the persons who engage the rooms. These circumstances seem to me to be inconsistent with the creation of legal tenancies giving estates carrying with them the right to legal occupation. They seem rather to support the view that the Governors of the Hospital were to retain the legal possession while they gave the accommodation of the rooms with the addition of seating, heating and lighting apparatus."

I think, my Lords, that this is right.

When one peruses those bye-laws this occurs to the mind—namely, what would have been the view taken of a good many of the transactions and arrangements provided for had the same language occurred in the prospectus of a company? It would have been said without any hesitation that that language was descriptive of the trade or business of providing, or providing for, public entertainments and that the real estate which was to be in possession of the company was to be the substratum of that business, with all the arrangements for suiting the market and for commercial adventure being made so as to obtain the largest possible revenue from the public. This is indeed the express language of s. 9 of the Irish Statute (25 Geo. 3, c. 43), which authorizes the Governors and guardians of the hospital to make bye-laws not only for the management of the hospital and funds, but "also for the proper management and protection of such places of public entertainment and resort, as shall stand on the premises."

Mr. Brown, in the brief but most helpful address which he made in his reply in this House, stated with great force this view: Suppose the owners, i.e., the Rotunda Hospital, did demise for its rental value the concert and ballrooms to a tenant at an annual rent (it might have been, say, a single tenant, or, for better illustration, a theatrical company), and that the lessee had then proceeded to carry on an

H. L. (I.) 1920

COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN.

Lord Shaw of Dunfermline.

entertaining business under rules just such as those which exist in the present case. It seems unanswerable that that company, earning a profit in so doing, would have been liable to taxation under Sch. D.

If the respondents are not so liable it must be simply that they are the owners and occupiers of the property in which the business is carried on. On this subject there appears, in the judgments of the Courts below, a variety of expressions to the effect that the taxation under Sch. A of owners and occupiers of hereditaments was meant to be "exhaustive." My Lords, I cannot agree with such a proposition. When income is derived by way of profit from any undertaking, the scope of the statute is that that income shall be liable to taxation irrespective of the identity of the person who earns the income with one who pays income tax in respect of other revenue, returns, or profits, under other schedules in the statute. The aim of the statute is to gather in all income and make it subject to taxation. That aim may, of course, have been imperfectly accomplished in the schedules of enumeration. But it is plain also from the language of Sch. D that while the main object, i.e., the ingathering of all income as a subject for taxation, was that which was being pursued, yet on the other hand it was necessary to avoid overlapping so as to prevent a double payment of taxation upon the same amount of income or any part of it. Yet, while the avoidance of overlapping of taxation is provided for, that avoidance cannot be made the reason or cover for escape from taxation. No countenance is given to the idea which seems to be favoured by some of the judges in the Courts below that the assessment in, say, Sch. A remits from the region of taxation any property or profits not reached by such a schedule but liable under another schedule.

The learned Master of the Rolls thus expressed these ideas: "Sch. A embraces only property in lands, tenements, hereditaments and heritages. Sch. D covers any kind of property and all profits and gains not charged by the other schedules, a kind of dragnet clause to capture everything; so that while the Rotunda rooms are taxable merely as lands

according to their annual value they are also taxable as an establishment with a certain equipment making it to some extent a going concern and thereby a profit-earning investment. This does not mean that the Governors are subject to double taxation because it will be seen later on that for a case like the present provision is made for giving credit against any assessment made under D for any assessment made under A."

I beg respectfully to express my concurrence with this.

If these views be sound, it follows that the profits of the entertaining business, to put the matter thus briefly, do not escape taxation under Sch. D because they are earned by a taxpayer who is the owner and occupant of buildings taxed under Sch. A. The identity of such owner and occupant with an undertaker, business man or trader, gives him no privilege as a taxpayer in the latter capacity.

The only remaining question therefore is whether the owner and occupant escapes by reason of the profits being devoted, as in fact they are, to charitable purposes. On this subject there was no difference of opinion in the Courts below, and I think rightly so. For it was agreed by all of the judges that the respondents, for the purposes of the Income Tax Acts, were in legal occupation of the concert and ballrooms and therefore that the receipts obtained from those who used or hired the premises from the respondents were not "rents and profits" within the meaning of the third branch of Sch. A, No. VI., so as to be thereby exempt from taxation. The Courts were further unanimous in holding that supposing the profits to be chargeable under D they may not be exempt from taxation by reason of their application to charitable purposes, seeing that the exemption is only applicable to profits in the nature of yearly interest or other annual payment. In my opinion, these views in the Courts below were correct on the two points mentioned. Naturally the result accordingly is that profits derived from what may be called the entertaining business do not escape taxation under Sch. D.

It is important on this head, my Lords, to observe what the case stated narrates upon that subject. It says that:

H. L. (I.) 1920 COMAN v. GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN. Lord Shaw of Dunfermline.

"In arriving at the precise quantum of liability the Surveyor of Taxes was prepared under the circumstances to allow the nett annual value of 250*l.* of the Rotunda rooms as a deduction in arriving at the profit assessable under Sch. D." To that extent there can be no question of the accuracy of the Surveyor's allowance. By making that allowance and in these terms he avoids the overlapping between Schedules A and D. But the case proceeds further: "He" (the Surveyor) "also admitted that certain adjustments fell to be made in respect of renewals of flooring, building, forms, seating and furniture, also a proportion of the general administrative salaries as applicable to the letting of the rooms."

This, my Lords, appears to me to be a clear application of proper commercial principles to the items falling to be debited against the concern under the head of a profit-earning concern, and it is only after these debited items appear that any nett profit emerges. The result is in my opinion that the deliverance of the Commissioners of August 13, 1907, must stand.

Order of the Court of Appeal in Ireland reversed, and decision of the Commissioners for the Special Purposes of the Income Tax Acts restored. By consent the appellant to pay the costs of the appeal to this House, as agreed between the parties, such costs to be taxed as between solicitor and client. Cause remitted to the King's Bench Division of the High Court of Justice in Ireland to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 13, 1920.

Solicitor for the appellant: *H. Bertram Cox, Solicitor of Inland Revenue, for R. Martin, Solicitor of Inland Revenue for Ireland, Dublin.*

Solicitors for the respondents: *Powell, Burt & Lamaison, for H. T. Dix & Sons, Dublin.*

[HOUSE OF LORDS.]

SINGER . . . . . APPELLANT ; H. L. (E.)*

AND 1920

WILLIAMS . . . . . RESPONDENT. *May* 17.

Revenue—Income Tax—Shares in foreign Company—Computation of Duty on Dividends—"Foreign Securities"—"Foreign Possessions"—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sch. D, Cases* 4 *and* 5—*Finance Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 5.

Shares in a foreign trading company are foreign possessions within Case 5 of Sch. D under s. 100 of the Income Tax Act, 1842, and are not foreign securities within Case 4 of that schedule. Therefore the duty to be charged under the Income Tax Acts and s. 5 of the Finance Act, 1914, in respect of the dividends arising from those shares is to be computed on the average of the three preceding years.

The effect of clause (*b*) of s. 5 of the Finance Act, 1914, is to exclude from taxation income which was paid or became due before April 6, 1914, but not to exclude it from the computation necessary to arrive at the amount of the tax on the three years' average.

Decision of the Court of Appeal [1919] 2 K. B. 94 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Sankey J. (2) upon a case stated by the Commissioners for General Purposes of the Income Tax Acts for the Division of Romsey in the county of Southampton.

The appellant, who resided at Norman Court in the Romsey Division, appealed against an assessment on him under Sch. D of the Income Tax Acts for the year ended April 5, 1916, in the sum of 80,000*l.* in respect of foreign possessions, upon the ground that in view of s. 5 of the Finance Act, 1914, the computation should be based on the amount of the profits in the year of assessment, and not on the average amount thereof in the three preceding years. His income, so far as it was the subject-matter of the assessment in question, was derived from the dividends which he received as a shareholder

* *Present:* VISCOUNT CAVE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD PHILLIMORE.

(1) [1919] 2 K. B. 94. (2) [1918] 2 K. B. 432.

H. L. (E.) 1920 SINGER v. WILLIAMS.

in an American corporation—namely, the Singer Manufacturing Co. of New Jersey in the United States of America.

The Commissioners decided that on the true construction of s. 5 of the Finance Act, 1914, the computation fell to be made on the average of the three preceding years.

Sankey J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal (Swinfen Eady M.R., Warrington and Scrutton L.JJ.).

1920. April 30; May 3. *Sir John Simon K.C.* and *Edwardes Jones* for the appellant. Under s. 5 of the Finance Act, 1914, a shareholder in a foreign company is liable to be assessed on the actual income arising from the shares in the current year of assessment and not on an average of the three preceding years. Shares in foreign companies are securities within Case 4 of Sch. D and are not foreign possessions within Case 5, to which alone the three years' average applies. The primary object of the Act of 1914 was to get rid of the decision in *Colquhoun* v. *Brooks* (1), which showed that profits from abroad, whether they fell under Case 4 or Case 5, were to be assessed to income tax so far only as they were remitted to this country. The principle of the Income Tax Acts is and always has been that a trading company pays on the three-year basis but the shareholders pay on the actual dividends received, and there is no reason for taxing a shareholder in a foreign trading company on any different principle.

" Securities " in its popular sense includes shares and stocks, and in a taxing Act the word is used in its popular sense. It is so defined in the Conveyancing and Law of Property Act, 1881, s. 2 (xiv.); in the Settled Land Act, 1882, s. 2, sub-s. 10 (viii.); and in the Trustee Act, 1893, s. 50. In *Trafford* v. *Boehm* (2) Lord Hardwicke assumed that South Sea stock and Bank stock were securities, although they were not good securities within the meaning of the settlement then under consideration. In *In re Rayner* (3) Vaughan

(1) (1889) 14 App. Cas. 493. (2) (1746) 3 Atk. 440, 444.
(3) [1904] 1 Ch. 176, 187.

Williams L.J. held that "securities" in its popular sense meant investments. In *Smiles* v. *Australasian Mortgage Co.* (1) Lord Shand speaks of "investments in foreign stock or other foreign securities." In *In re Gent and Eason's Contract* (2), again, Farwell J., quoting Romer L.J. in *In re Rayner* (3), held that "securities" in its wider sense was equivalent to investments; and *Gresham Life Assurance Society* v. *Bishop* (4) proceeded on that basis. The dicta of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (5) and of Fletcher Moulton L.J. in *Gramophone Ld.* v. *Stanley* (6) were obiter only and if and so far as they are inconsistent with the appellant's contention they are incorrect. Where foreign dividends are remitted to a bank in this country it is the custom of the bankers in accordance with s. 26 of the Customs and Inland Revenue Act, 1885, to deduct income tax from the dividends actually received in the then current year, and it would be a strange anomaly that a different rule should prevail if, instead of the dividends being paid into a bank, they are used by the owner for his own purposes. Sect. 26 of the Act of 1885 and the sections of the previous Acts which it incorporates are so devised as to operate on a tax measured by the actual figures of the current year, and they afford a strong indication of the intention of the Legislature as to method of computing the tax on these investments. Assuming that the appellant is wrong in his construction of "securities," s. 5 of the Finance Act, 1914, by providing that "notwithstanding anything in the rules under the Fourth and Fifth Cases in s. 100 of the Income Tax Act, 1842," the income tax is to be "computed on the full income" sweeps away both Case 4 and Case 5 and precludes the use of the three years' average.

Lastly, clause (*b*) of s. 5 expressly precludes any construction which would render income from foreign securities, stocks, shares or rent which was paid or became due before April 6, 1914, liable to taxation, and a computation of tax for the year

(1) (1888) 2 Tax Cas. 367, 378.
(2) [1905] 1 Ch. 386.
(3) [1904] 1 Ch. 176, 187.
(4) [1901] 1 K. B. 153; [1902] A. C. 287.
(5) [1893] 2 Q. B. 499, 516.
(6) [1908] 2 K. B. 89, 97.

H. L. (E.) 1920 SINGER v. WILLIAMS.

ended April 5, 1916, on the three years' average involves that one-third of the income for the year ended April 5, 1914, is rendered liable to taxation. Where the taxation is by reference to past averages, Sch. D makes special provision for cases where there is no material for making the average, and if this were the construction to be placed on s. 5 of the Act of 1914 one would have expected to find in the section some similar provision. That section ought not to be construed as having any retrospective effect unless the statute by express words or necessary implication requires such a construction.

Reginald Hills (*Sir Gordon Hewart A.-G.* with him) for the respondent. Shares in a foreign company have always been treated as foreign possessions within Case 5 and not as foreign securities within Case 4. The only substantive effect of s. 5 of the Act of 1914 is to remove the limitation previously existing on the operation of Cases 4 and 5—namely, remittance from abroad. It is clear from the language of Lord Herschell and Lord Macnaghten in *Colquhoun* v. *Brooks* (1) that "possessions" in this connection is a word of the widest possible signification and would naturally include shares in a foreign company. Throughout the Act of 1842 the tendency is to use a precise word in a precise sense and then to follow it by a general word to sweep up everything not included in the previous definition. It must be remembered that at the time of the passing of that Act shares in companies were not nearly so common as at the present day. *In re Rayner* (2) proceeded on the assumption that the natural and ordinary meaning of securities did not include shares, and turned upon the special terms of the will. Broadly speaking, the term "securities" involves the relationship of debtor and creditor. The holder of a security is a creditor and is entitled to a periodical return of a more or less fixed sum by way of interest. Case 4 relates to the "duty to be charged in respect of interest arising from foreign securities." Even assuming that "securities" might be strained to mean shares, it is impossible to strain "interest" to mean dividends.

The Income Tax Act, 1853, s. 10, distinguishes between

(1) 14 App. Cas. 493, 508, 516. (2) [1904] 1 Ch. 176, 187.

securities and stocks and shares and between interest and dividends. Upon the construction of that Act "securities" means what Farwell J. and Romer L.J. said was the natural meaning of the word. *Bartholomay Brewing Co.* v. *Wyatt* (1) and *Gramophone Ld.* v. *Stanley* (2) strongly support the respondent's contention. In *Gresham Life Assurance Society* v. *Bishop* (3) it was assumed that the question arose under Case 4, but the point was not dealt with. If "securities" in s. 5 of the Finance Act, 1914, means stocks and shares why should the Legislature have made use of "stocks and shares"? The statute preserves the distinction made by the Act of 1853. No argument can be founded on the phrase "full amount of income." Those words appear throughout the Income Tax Acts and were inserted to secure that no improper deductions were made. By the Income Tax Act, 1918, which is a consolidation Act only, it is provided by r. 1 of the rules applicable to Case 5 that "the tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years," and r. 2 deals with "possessions out of the United Kingdom other than stocks, shares or rents." Reliance has been placed upon the machinery provisions, but they must read subject to the substantive provisions. If the respondent is right in maintaining that on the substantive provisions these shares are not securities but possessions and that the three years' average applies, the machinery provisions cannot alter that: *Werle* v. *Colquhoun* (4); *Drummond* v. *Collins* (5); *Brooke* v. *Inland Revenue Commissioners* (6); *Ashton Gas Co.* v. *Attorney-General.* (7) As to assimilating the position of English and foreign shareholders, an English company is assessed in respect of its trading profits on the three-year basis, but in the case of a foreign company no such assessment is possible; it is therefore not unnatural that shareholders in a foreign company

(1) [1893] 2 Q. B. 499, 516.
(2) [1908] 2 K. B. 89, 97.
(3) [1901] 1 K. B. 153; [1902] A. C. 287.
(4) (1888) 2 Tax Cas. 402, 412.
(5) [1915] A. C. 1011, 1018, 1019.
(6) [1918] 1 K. B. 257, 270.
(7) [1906] A. C. 10.

H. L. (E.) 1920 SINGER v. WILLIAMS.

should be assessed on that basis. As to the argument that income paid before April 6, 1914, is being taxed, the three years' average is merely the measure of the income to be taxed for the year 1916, and s. 5 (*b*) does not exclude from the computation income which has become due before April 6, 1914.

Sir J. Simon K.C. in reply referred to the Finance Act, 1916, s. 27, sub-ss. 1 and 7.

The House took time for consideration.

1920. May 17. VISCOUNT CAVE. My Lords, this appeal raises a question as to the mode in which the income from certain foreign investments should be assessed to income tax under the Income Tax Acts and s. 5 of the Finance Act, 1914.

The appellant, who is domiciled or ordinarily resident in this country, is the holder of shares in an American corporation called the Singer Manufacturing Co. of New Jersey. The dividends on these shares are not remitted to this country, but are placed to the credit of the appellant in the United States. The Commissioners for the Romsey Division of the county of Hants, acting under the above-mentioned section of the Finance Act, 1914, assessed the appellant to income tax in respect of the year ending April 5, 1916, in the sum of 80,000*l.* (since reduced to 76,687*l.*) as being the profit received from the above shares on an average of the three years preceding the year of assessment. The appellant objected to this assessment on the ground that on the true construction of the statutes he was not liable to be assessed on a three years' average, but only on the actual amount of dividend received in the year of assessment—namely, 47,080*l.* On an appeal to the High Court of Justice the assessment made by the Commissioners was confirmed by Sankey J., whose decision was afterwards affirmed by the Court of Appeal. Thereupon this appeal was brought.

In the course of the argument for the appellant reference was made to certain earlier statutes relating to income tax,

which are now repealed. It appears to me that for the purposes of this case no reliable inference can be drawn from the language of those statutes, and that the decision must depend on the construction of the Income Tax Act, 1842, as modified by later statutes.

By the Act of 1842 foreign income was made assessable under Sch. D of the Act, and fell either within the "fourth case" of the Schedule as "interest arising from foreign securities" or within the "fifth case" as "foreign possessions." The rules for assessment provided that in both cases the duty should be computed only on the amounts received in Great Britain; and it was declared that in assessments falling under the 4th Case the duty should be computed on the sum received in Great Britain "in the current year," i.e., in the year of assessment, but that in those falling under the 5th Case the computation should be made "on an average of the three preceding years." Under that Act therefore the mode in which the income was to be computed for the purpose of assessment was dependent on the nature of the property from which it was derived. If that property was a foreign security, the actual income for the current year was to be the basis of taxation; if it was a foreign possession of some other kind, the taxation was to be upon a three-year average as in the "first case."

By the Income Tax Act, 1853, some modification was made in the general words in Sch. D, and the tax was extended to Ireland; but it was provided by s. 5 of this Act that the regulations and provisions of the Act of 1842 (so far as consistent with the new Act) should continue to apply. Accordingly, it was held in *Colquhoun* v. *Brooks* (1) that notwithstanding the generality of the language in Sch. D of the Act of 1853, the tax on foreign income was still regulated by Cases 4 and 5 in the Act of 1842, and was therefore leviable only on sums received in the United Kingdom.

It appears to have been found by experience that the limitation of the tax on foreign income to income received in the United Kingdom led to transactions by which the

(1) 14 App. Cas. 493.

H. L. (E.) 1920 SINGER v. WILLIAMS. Viscount Cave.

liability to tax was avoided; for it was within the power of a person resident in the United Kingdom to cause his foreign income or some part of it to be paid to his account abroad and invested or expended there, so that the liability to income tax should not attach to it. It was no doubt for this reason that the Legislature enacted s. 5 of the Finance Act, 1914, which (so far as material) provided as follows: "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth cases in section one hundred of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom to the same deductions and allowances as if it had been so received, ... and the provisions of the Income Tax Acts (including those relating to returns) shall apply accordingly."

Then followed a saving clause to which I will refer hereafter, and a proviso that the section should not apply in the case of a person not domiciled or ordinarily resident in the United Kingdom.

The effect of this enactment is plain. It abrogates in respect of the four sources of income specified in the section—namely, securities, stocks, shares and rents, the limitation imposed by the earlier statutes and explained in *Colquhoun* v. *Brooks* (1), that is to say, that foreign income to be taxable must be received in the United Kingdom; but in other respects it leaves untouched the provisions of those statutes, including the division of foreign property into foreign securities and other foreign possessions and the distinction in the method of assessing the income accruing from those sources respectively. Accordingly, in cases falling within the section the interest from foreign securities must still be computed for the purpose of the tax on the amount received in the current year, while the profits from other foreign possessions must continue to be computed on a three-year average.

(1) 14 App. Cas. 493.

It follows from the above summary that the main question to be determined in the present case is whether the shares in the Singer Manufacturing Co. of New Jersey, which are the subject of the assessment in dispute, are "foreign securities" within Case 4 or "foreign possessions" within Case 5. If they are "foreign securities," then the assessment, which was made upon an average of three years, was wrongly made; but if not, they are clearly "foreign possessions," and in that case the assessment should stand.

My Lords, the normal meaning of the word "securities" is not open to doubt. The word denotes a debt or claim the payment of which is in some way secured. The security would generally consist of a right to resort to some fund or property for payment; but I am not prepared to say that other forms of security (such as personal guarantee) are excluded. In each case, however, where the word is used in its normal sense, some form of secured liability is postulated. No doubt the meaning of the word may be enlarged by an interpretation clause contained in a statute, as by the interpretation clauses in the Conveyancing and Law of Property Act, 1881, the Settled Land Act, 1882, the Trustee Act, 1893, and the Finance Act, 1916; or the context may show, as in certain cases relating to the construction of wills (*In re Rayner* (1); *In re Gent and Eason's Contract* (2)), that the word is used to denote, in addition to securities in the ordinary sense, other investments such as stocks or shares. But, in the absence of any such aid to interpretation, I think it clear that the word "securities" must be construed in the sense above defined, and accordingly does not include shares or stock in a company. In the present case there is no interpretation clause and there appears to me to be no context which affects the ordinary meaning of the word "securities." The combination in Case 4 of the word "interest" with the word "securities" tells strongly in favour of a strict interpretation of the latter word; and the same construction reappears in Sch. G, r. x. The exception from Case 4 of "such annuities, dividends and shares as are directed to be charged

(1) [1904] 1 Ch. 176. (2) [1905] 1 Ch. 386.

BIBL. LONDIN

H. L. (E.) 1920 SINGER v. WILLIAMS. Viscount Cave.

under Sch. C of this Act" affords no argument to the contrary, as the dividends there referred to are plainly dividends on Government annuities, and the "shares" are shares of such annuities. The context, therefore, so far as it goes, is in favour of the view that the shares of a foreign company are not "securities" within the meaning of Case 4, and accordingly fall within Case 5. This was so decided in *Bartholomay Brewing Co.* v. *Wyatt* (1), where Wright J. said that "shares in a company are not securities but portions of its capital"; and to the same effect is the dictum of Fletcher Moulton L.J. in *Gramophone Ld.* v. *Stanley* (2) that "the holding of shares in a foreign corporation, entirely situated and carrying on business in a foreign country, comes unquestionably under r. 5." I see no reason for questioning those opinions, with which I fully agree.

It was argued on behalf of the appellant that a decision in favour of the respondent would lead to an anomalous distinction between shares in foreign companies and shares in British companies, as in the case of shares of the latter kind tax is deducted under s. 54 of the Income Tax Act, 1842, from the dividend for each year; but it appears to me that any argument to be derived from s. 54 tells the other way. As pointed out by Warrington L.J. in the Court of Appeal, the shareholder in a British company pays by way of deduction a part of the tax paid by the company, and this has already been computed on the principle of average; while in the case of a foreign company the profits of the company cannot be charged at all and the tax falls for the first time on the income of the shareholder. This being so, a closer analogy is established between the two cases by applying the principle of average to the dividends on foreign shares than by taxing the dividend for each year.

Counsel for the appellant also relied upon certain provisions contained in s. 10 of the Income Tax Act, 1853, and in some later statutes (3) which require bankers and others entrusted

(1) [1893] 2 Q. B. 499, 516.
(2) [1908] 2 K. B. 89, 97.
(3) See Revenue (No. 2) Act, 1861, s. 36; and Customs and Inland Revenue Act, 1885, s. 26.

with the payment of foreign dividends to persons in the United Kingdom to pay to the revenue authorities the tax on such dividends as assessed by the Commissioners under Sch. D, charging the amounts so paid to the persons entitled to the dividends in question; they pointed out that paying agents of the character described have generally no materials for arriving at an average of the dividends receivable by any particular shareholder, and accordingly must and do pay and deduct tax at the current rate in respect of the amounts actually received in the year of assessment, without reference to any average, and they contended that these enactments and the practice followed in carrying them into effect throw a light on the construction of the Act of 1842 and the meaning of the word "securities" therein contained. My Lords, it may be that the practice is as stated. No doubt it is convenient, and in the long run inflicts no injustice upon the shareholders concerned. But I am not satisfied that it is in strict and technical accordance with the enactments in question. It does not appear to me that it would be beyond the power of the Commissioners, who are required by the statutes to determine the sums to be deducted, to proceed by way of average; and, however this may be, I am unable to see how the fact that, upwards of ten years after the passing of the Act of 1842, special machinery was provided for collecting in a limited class of cases the tax thereby imposed, can alter the general liability of the taxpayer as between himself and the Crown, or affect the construction of the earlier Act of 1842. Indeed, any weight which might otherwise be given to these provisions as a parliamentary construction of the earlier statute is overborne by the considerations: (1.) that in s. 10 of the same Act of 1853 the "stocks, funds, or shares" of a foreign company are clearly distinguished from the "securities given by or on account of any such company"; (2.) that in s. 5 of the Finance Act, 1914 (which was passed after the above-cited decisions as to the meaning of the word "securities"), stocks and shares are referred to as something distinct from securities; and (3.) that in the schedule to the Income Tax Act, 1918, the consolidating

H. L. (E.) 1920

SINGER v. WILLIAMS.

Viscount Cave.

statute now in force, stocks and shares are classified as coming under Case 5 and not under Case 4.

An argument was founded on the direction contained in s. 5 of the Act of 1914 that the tax should be computed on the "full amount" of the income whether received in the United Kingdom or not; and it was suggested that the expression "full amount" there used meant the actual income for the year. But the expression "full amount" is found in the rules relating to Case 5 in the Act of 1842 as well as in other parts of the Income Tax Acts; and no inference can be drawn from the use of the same expression in s. 5 of the Act of 1914.

A last argument was founded upon the saving clause contained in s. 5. That clause, which immediately follows the direction (above set out) that the provisions of the Income Tax Acts shall apply, is as follows: "And nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year any sums which represent . . . . (*b*) income from any such securities, stocks, shares, or rents which was paid or became due before the sixth day of April, nineteen hundred and fourteen."

It was contended that if the tax is computed upon an average of three years preceding the financial year 1915–1916, such computation must include income which was paid or became due before April 6, 1914, and accordingly is an infringement of paragraph (*b*) of the above clause. It appears to me that this argument rests upon a misunderstanding of the provision in question. The enactment is that "nothing in those provisions" (that is to say, in the provisions of the Income Tax Acts) "as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year" income which was paid or became due before the duty was imposed in the new form; and the object appears to be to protect the taxpayer from being liable to a double tax—namely, the tax under the new Act on all foreign income of the nature described, and the tax under the earlier statutes on similar

income accrued before the date mentioned and remitted after that date to the United Kingdom. It has no reference to the computation of income for the purposes of s. 5 of the new Act.

For the above reasons it appears to me that the dividends in question were properly assessed upon an average of three years, and accordingly that this appeal fails and should be dismissed with costs.

LORD ATKINSON. My Lords, I concur. Sch. D of the Act of 1842 treats the interest arising from securities upon which income tax is to be charged as something, if not different in kind, at all events different in the mode in which it is to be measured for the purpose of this tax, from the income arising from "foreign possessions." The first question for decision therefore is, are shares in a manufacturing company carrying on its business in the United States of America "securities" or "foreign possessions" within the meaning of the Income Tax Acts of 1842 or 1853? Now, shares in such a company are portions of the capital of the company. The company carries on its manufacture in factories built on American soil for the benefit of its shareholders. The net profits made by those operations are divisible in whole or in part amongst those shareholders. These profits are, as it were, the fruit of the tree planted in American soil, and should the company be wound up, if its assets were more than sufficient to discharge all its debts and liabilities, the overplus would be divisible amongst its shareholders. A share in such a company resembles a chose in action in this respect, but in this respect only, that it is assignable, and the assignee would be entitled to sue upon it to obtain his appropriate share of the net profits just as the original holders would be. In my opinion therefore shares in such a company are "foreign possessions" within the meaning of Case 5, Sch. D, of the Income Tax Act of 1842, rather than securities within Case 4. In popular language shares such as these may sometimes be described as securities, and the context in wills and other instruments in which the word "securities" is found may show that the word was used to include shares in companies.

H. L. (E.) 1920 SINGER v. WILLIAMS. Lord Atkinson.

In *Colquhoun* v. *Brooks* (1) the matter dealt with was the income derived by the Respondent, who was resident and domiciled in England, from a trading firm carrying on a business in Australia in which firm he was a partner, not a shareholder. In that respect the case differs from the present, but the reasoning upon which the judgments of Lords Herschell and Macnaghten were based applies, I think, to the present case.

Lord Herschell said (2): "Now the word 'possessions' is not used in the part of Schedule D which describes the subjects of the tax. Speaking generally they are defined to be the profits arising from property and those arising from trades and professions. When therefore the term 'possessions' is employed it seems to indicate an intention to cover by it something more than 'property.' And it is difficult to see why, unless the intention were to embrace something more, the latter word was not used. 'Possessions' is a wide expression, it is not a word with any technical meaning; the Act supplies no interpretation of it. I cannot see why it may not fitly be interpreted as relating to all that is possessed in Her Majesty's Dominions out of the United Kingdom or in foreign countries and which is a source of income. And if so I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere."

It would appear to me that these last words apply to a shareholder in a foreign manufacturing company equally with a partner in a foreign firm engaged in commerce.

Lord Macnaghten (3), after reviewing the earlier legislation on this subject of income tax, said: "Turning now to the 'fifth case,' I ask, why are not the respondent's profits and gains from his Melbourne business within the 'fifth case'? What is the meaning of the term 'possessions' in that case? The word 'possessions' is not a technical word. It seems to me that this is the widest and most comprehensive word that

(1) 14 App. Cas. 493. (2) Ibid. 508.
(3) Ibid. 516.

could be used. Why, for instance, should not 'possessions in Ireland' mean everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not 'profits from possessions out of Great Britain' . . . . mean profits from every source of income abroad? I use the expression 'source of income,' because it is as a source of income that the Act contemplates and deals with property, and everything else that a person chargeable under the Act may have, and the Act itself, in s. 52, uses the expressions 'sources chargeable under the Act' and 'all the sources contained in the said several Schedules' as describing everything in respect of which the tax is imposed."

This case was decided in 1889, twenty-five years before the Act of 1914 was passed, and it was held in it that the respondent's portion of the profits of his foreign firm not received in the United Kingdom was not liable to income tax, but that the portion of those profits which was received in the United Kingdom was, because of that, subject to income tax which had to be computed on an average of the three years as directed in Case 1 of Sch. D, rule 1, i.,2, "on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment." By s. 5 of the Finance Act, 1914, income tax in respect of income arising from securities, or from something treated as other than securities—namely, "stocks, shares or rent," is to be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not so received to the same deductions and allowances as if it had been received, and also subject to the other deductions named.

It was urged on behalf of the appellant that owing to the provisions of certain of the machinery or collecting sections of the Act of 1842, it would be quite impossible to make the

H. L. (E.) 1920 SINGER v. WILLIAMS. Lord Atkinson.

computation directed to be made, where the income tax was to be levied on the full amount of the income under s. 5 of the Act of 1914. There may be some difficulty in applying these sections to such a case, but I am not at all convinced that it exceeds to a substantial degree, if at all, the difficulty of applying them to cases where only the portion of the income received in the United Kingdom is subject to the tax. The provisions of the Income Tax Act relating to returns are made applicable to the former case as they always have been to the latter, and the receiver of the income in such a case will be under the same obligation to make those returns as he was when only a portion of his income was received in the United Kingdom. By the first proviso to this s. 5 income from any securities, stocks or shares or rents on which income tax has been paid under the section, or which was paid or became due before April 6, 1914, was not to be rendered liable, under the rules, to income tax for the current or any subsequent year. But though income tax cannot be levied on such sums of income as these, there is nothing to prevent them being taken into account in fixing the fair and just average of the income for three years as required by Sch. D, Cases 5 and 1. Sir John Simon urged, as I understood him, that in the present instance to take the profits and gains received by the appellant in the year 1913 for the purpose of arriving at this average would amount in effect to taxing them. I do not think this is so. For instance, if the income accruing to the appellant in that year was very small the taking it into account for the purpose of averaging would reduce the income to be taxed in the year 1916 much below what was actually received. Where the income from any source is variable in amount from year to year the taking of the three years' average of it is in relief of the taxpayer, rather than the contrary.

In my view the decision of the Court of Appeal was right on both points. I therefore think that the appeal should be dismissed with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. The appellant is ordinarily resident in the United Kingdom.

He receives certain income in this country "as a shareholder in an American corporation, i.e., the Singer Manufacturing Company of New Jersey in the United States of America." The simple question in the case is whether this income, consisting of the dividends so received, falls within Case 4 or Case 5 of Sch. D of the Income Tax Act of 1842. In other words, does this income fall under the denomination of "interest arising from . . . . foreign securities," or under Case 5, "in respect of . . . . foreign possessions"?

"Possessions" is a wide generic term. It comprehends all that a man possesses, and whether it be the shares of the Singer Company or the dividends received from those shares, it is no doubt true that the word "possessions" would cover them. "Foreign possessions" in this wide generic sense would cover "foreign securities" also: but the statute under construction has enumerated foreign securities as a separate and distinct case, and one to be treated on different principles from the case of foreign possessions. Foreign securities, so to speak, are cut out of the comprehensive term and made to stand by themselves in a different and separate category.

The word "securities" has no legal signification which necessarily attaches to it on all occasions of the use of the term. It is an ordinary English word used in a variety of collocations; and it is to be interpreted without the embarrassment of a legal definition and simply according to the best conclusion one can make as to the real meanings of the term as it is employed in, say, a testament, an agreement, or a taxing or other statute as the case may be. The attempt to transfer legal definitions derived from one collocation to another leads to confusion and sometimes to a defeat of true intention. Of these two things accordingly—"foreign possessions" and "foreign securities,"—which of the two terms fits the case of the shares in the Singer Company of New Jersey? A security means a security upon something. Securities in the present instance, being in contrast with or separation from possessions, cannot be taken as the same word would be taken if applied for instance to the lodging by a

H. L. (E.) 1920 SINGER v. WILLIAMS. Lord Shaw of Dunfermline.

customer of securities with his bank, in which case the term would naturally apply to the scrip which he hands over the counter. Securities in Case 4 of Sch. D appear to me to mean securities upon something as contrasted with the possession of something. The term involves the idea of the relation of creditor with debtor, the creditor having a security over property, concern, assets, goods or other things, which are, so to speak, put in pledge by the debtor and form the security for the fulfilment of his obligation to the creditor. This is not the position of Mr. Singer's title. He is a shareholder. The relation between him and his fellow shareholders is not that of creditor with debtor but of partner or joint adventurer with the other shareholders; his relation with the company is that of part-owner of the concern. The property which he so holds falls, in my opinion, accordingly as a matter of construction, under the term "possessions" and not under the term "securities." The remarks of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (1) and of Fletcher Moulton L.J. in *Gramophone Ld.* v. *Stanley* (2) may, as was argued, have been obiter; but I am humbly of opinion that they were entirely sound.

The practical results, my Lords, of this view seem to confirm it completely. For, in practice, the return from securities is, in the general case, a fixed and certain return; whereas in practice the income or dividend derived from shares is or may be in the general case variable and uncertain, depending as it does upon the rise or fall of the fortunes of the business. To the former, i.e., securities with a fixed return, the principle of averaging up one year with another is not in place. Whereas to the latter, the case of variable returns from possessions, the principle of averaging up during a course of three years naturally applies. I think the statute meant in this practical way to have the assessment proceed. This distinction, of the case of securities taxed year by year as the fixed income comes in, from the case of possessions taxed upon the average of the variable return, follows the line of incidence which the Legislature of set purpose

(1) [1893] 2 Q. B. 499, 516. (2) [1908] 2 K. B. 89, 97.

meant to pursue. In my opinion that purpose was sufficiently accomplished by the distinction between the two cases, and I may add that I am not satisfied that in the working out of the statute there would be produced such difficulties as were conjectured in argument, and these would need, in my opinion, to be shown to be well-nigh insuperable before they could affect the interpretation of the Act.

LORD WRENBURY (read by LORD ATKINSON). My Lords, I agree. I desire only to add a few words as to the meaning of the expressions "securities" in Case 4 and "foreign possessions" in Case 5 of Sch. D, for it is on the meaning of these words that the decision of this case depends.

A security, I take it, is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor. There are two owners and the right of the one has precedence of the right of the other. A share in a corporation does not answer the above description. There are not two owners, the one entitled to a security upon something and the other entitled to the balance after satisfying that demand. A share confers upon the holder a right to a proportionate part of the assets of the corporation; it may be a proportionate part of its profits by way of dividend, or it may be a proportionate part of its distributive assets in liquidation. There is no owner other than himself.

These meanings must no doubt yield to any inference to be drawn from the context in which the expression occurs, and necessarily to any express definition such as that in s. 27 (7) of the Finance Act, 1916. Here there is no such context or definition. Our attention has been drawn to provisions in the Acts which no doubt render it difficult or laborious to ascertain the three-year average in the case of shares in a foreign corporation. They are not, I think,

H. L. (E.) 1920

SINGER v. WILLIAMS.

sufficient to affect that which is the meaning of the word "securities" as I have stated it.

I think the appeal fails.

LORD PHILLIMORE. My Lords, I agree. This is not a question of the liability to tax, but solely of the measure by which the taxable income of the appellant for the year in question is to be ascertained, whether the source of income for which it is proposed to tax the appellant is to be considered as interest arising from foreign securities, in which case it is to be computed as that which has been or will be received in Great Britain in the current year, under Case 4 of Sch. D, or whether it comes under Case 5 as income from foreign possessions, in which case it is to be computed on an average of the three preceding years.

In common with the rest of your Lordships I attach no importance to an argument which was based on the language of the Act which brought this income within the sphere of taxation, that is, s. 5 of the Finance Act of 1914. The object of that Act is to make persons resident in this country taxable on their income arising from securities, stocks, shares, and rents in any place out of the United Kingdom, whether the income has been or will be received in the United Kingdom or not. As regards such income when received out of the United Kingdom it is to be taxed in future in the same way as if it had been received in the United Kingdom—that is, according to the same measure. If, supposing it had come into this country, it would have been taxable under Case 5, it, not coming into this country, is taxable under the same case; and the measure which would have to be applied if the dividends on Singer's shares in the Singer's Company had been remitted to the appellant in this country, instead of being retained in the United States, is the same as the measure applicable to this case.

The contention on behalf of the Surveyor is based upon a strict construction of the language of Cases 4 and 5. The argument on behalf of the appellant rests upon the anomalies which such a construction would produce, and also partly

upon an inference from certain statutes with regard to the payment of income tax by persons entrusted with payment in England of dividends on the shares in foreign companies.

The first suggested anomaly is that, whereas in respect of companies in the United Kingdom the shareholder pays the income tax appropriate to the particular dividend, which is usually, though not always, deducted by the company before payment, and so pays income tax upon the actual sum he receives yearly, the holder of shares in a foreign company will, if he comes under Case 5, pay on a computation of the average of the three preceding years. It is true that the effect of this will be that the measure of income tax paid on dividends from companies outside the United Kingdom will, year by year, be different from the measure of income tax paid or borne on dividends declared by companies in the United Kingdom. But a British company taken as a corporate entity does pay income tax like any other trader upon a notional annual income arrived at by computing the average of its profits for the three preceding years, and the method by which this income tax is in turn transferred to the shareholder is that provided by s. 54 of the Act of 1842, which provides that there should be allowed out of the dividends which it pays "a proportionate deduction in respect of the duty so charged." A foreign company which does not pay the British income tax in its corporate capacity makes no such proportionate deduction; and it is not unreasonable that when the shareholder comes to pay, instead of having his tax deducted at the source, he should pay upon the three-year average as being a shareholder in a trading concern.

The next anomaly arises in this way. By the Income Tax (Foreign Dividends) Act of 1842 every person entrusted with the payment of annuities, or dividends, or shares of annuities out of the revenue of any foreign State has to deliver an account to the Commissioners for Special Purposes who will make an assessment on such person under Sch. C. He is then authorized to pay the income tax and deduct it from the payment which would have to be made to the investor.

By s. 10 of the Income Tax Act, 1853, these provisions are

H. L. (E.) 1920 SINGER v. WILLIAMS. Lord Phillimore.

extended to the assessing and charging under Sch. D of the duties on all interest, dividends or other annual payments, payable out of or in respect of stocks, funds, or shares of any foreign company, and there is subsequent legislation which carries the matter somewhat further in the same direction. It is said, as it seems to me correctly, that the person entrusted who is to make his return will make his return yearly, and will return for assessment and tax the interest or dividends accruing to his principal for that year, and will deduct from the sum he pays to his principal the tax of that year, and that there will be no question of average, and therefore that, where the Act of 1853 or subsequent similar legislation applies, the measure will be that applicable to Case 4 and not that applicable to Case 5. As I have said, it appears to me that this contention is right. The argument then proceeds: If this be so and yet the contention of the Commissioners is right for a case where dividends are paid direct to the shareholder and not to a person entrusted, the mere difference of machinery will make a difference in the measure. Having arrived at this conclusion, then you must admit, it is said, that a difference in the mode of payment, which the company and perhaps the shareholder can make at pleasure, will make a difference in the measure by which the tax is to be computed, with a result which may be injurious to the revenue. Then the argument concludes: Either this shows that the true meaning of the word "securities" in Case 4 is such as to include under it, stocks, funds, and shares; or, whatever might otherwise be deemed to be the meaning, the Act of 1853 has put a statutory construction upon this word.

My Lords, there is force in this argument and at one time I was a good deal swayed by it; but I think it is not strong enough. The result may well be that the anomaly exists, that there are two measures, one applicable where the shareholder receives his foreign dividends direct, and one applicable when there is a person entrusted by the company with the payment of dividends. The result is strange but not impossible; and, the arguments for the appellant being exhausted, I turn to the arguments for the Surveyor. They

are derived from the actual language. I have not been myself much impressed by the word "securities." No doubt the proper meaning is that which has just been given by my noble and learned friend Lord Wrenbury. No doubt also the Court of Chancery has construed the word "securities" when it appears in an instrument creating a trust, as confined to securities in the strict sense of the word, unless there should be other words in the instrument showing that the creator of the trust has attached to them a different meaning. But then it must be remembered that the Court of Chancery started with the view that there was only one investment open to trustees, that is in Consolidated Bank Annuities, that even investments in other Government stocks, such as Reduced 3 per cents. or New 3 per cents., were only gradually and somewhat grudgingly admitted, and that thenceforward, as from time to time the area of trustees' investments has been extended, either by the private instrument or by Act of Parliament, the Court has always looked on each new investment as having the duty of making good its title to admission.

In a popular sense the word "securities" includes, I think, nowadays the scrip of stocks and shares. It may be said that this sense is a loose one, but so I think is the word "possessions" used in Case 5. To me possessions would mean something tangible. Possessions abroad would mean such things as a sugar plantation, or bales of goods; and I should distinguish choses in possession from choses in action, and included in the latter stocks and shares carrying dividends as well as all interest-bearing debts. But there is high authority for saying that the word "foreign possessions" in Case 5 includes any form of property from which profit can be derived, and would indeed include property coming under Case 4, if it had not been specifically cut out from the larger mass. Perhaps the real explanation is that in 1842 there were few incorporated companies, fewer which were foreign companies, and fewer still which were foreign companies having shares owned in Great Britain; so that while the Legislature has used language

H. L. (E.) 1920 SINGER v. WILLIAMS. Lord Phillimore.

which has been construed as wide enough to include all foreign species of property, what were principally in mind at the time were investments in lands, or in plantations or factories abroad. Accepting, then, the argument of the Crown that Case 5 deals with the mass and Case 4 with the excepted body only, I am impressed in Case 4 not so much by the word "securities" as by the words "interest arising from securities." Even there the language is not very clear. The words run: "The duty to be charged in respect of interest arising from securities in the British plantations in America or in any other of Her Majesty's Dominions out of Great Britain and foreign securities" with the exception of annuities charged under Sch. C. Do these words mean the duty to be charged in respect of interest arising from foreign securities, or do they mean the duty to be charged in respect of foreign securities? It might be hard to say, but the matter is cleared up by Sch. G, r. x., where the phrase used is "every person receiving in Great Britain interest from securities out of Great Britain," while r. xi. speaks of "every person receiving in Great Britain profits from possessions out of Great Britain." Reading the language of Case 4 by the construction put upon it by these rules I can have no doubt that Case 4 is limited to securities in the narrower and technical sense, and that these shares are not such securities, and are to be assessed on the three-yearly average, and that the decision of the Court of Appeal is right and should be confirmed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1920.

Solicitors for the appellant: *Church, Rendell, Bird & Co.*

Solicitor for the respondent: *H. Bertram Cox, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

WILLIAMS . . . . . APPELLANT; H. L. (E.)*
1920
AND
SINGER AND OTHERS . . . . . RESPONDENTS. *May* 17.

POOL . . . . . APPELLANT;
AND
ROYAL EXCHANGE ASSURANCE . . RESPONDENTS.

Revenue—Income Tax—Foreign Possessions—Dividends not remitted to United Kingdom—British Trustees of Foreign Beneficiaries—Liability to Income Tax—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.

Where trustees hold shares in a foreign company on behalf of a foreign subject domiciled abroad, the fact that they themselves are domiciled and resident in the United Kingdom does not make them chargeable with income tax in respect of dividends on those shares not remitted to this country but paid direct to the beneficiary abroad.

Decision of the Court of Appeal [1919] 2 K. B. 108 affirmed.

APPEALS from two decisions of the Court of Appeal (1) affirming decisions of Sankey J. upon cases stated by the Commissioners for Special Purposes of the Income Tax Acts.

Both appeals raised the same question—namely, whether under s. 5 of the Finance Act, 1914, trustees domiciled and resident in the United Kingdom, who held shares in a foreign company on behalf of a foreign subject domiciled and resident abroad, were liable to income tax in respect of dividends on the shares not remitted to this country but paid direct to the beneficiary abroad.

In the first case the respondents, the trustees, were assessed as private individuals without reference to any trust; in the second case the respondents were assessed "as trustees under the will of J. P. Mellor (deceased) for beneficiary Mrs. H. P. Munthe." In all other respects the facts in the two cases were similar.

* *Present:* VISCOUNT CAVE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY, and LORD PHILLIMORE.

(1) [1919] 2 K. B. 108.

H. L. (E.)
1920
WILLIAMS
v.
SINGER.
POOL
v.
ROYAL
EXCHANGE
ASSURANCE.

The facts are fully stated in the opinion of Viscount Cave.

The Commissioners for Special Purposes of the Income Tax Acts decided in each case that the liability to income tax was determined by the domicil of the beneficiary and they discharged the assessment.

The decisions of the Commissioners were affirmed by Sankey J. and his decisions were affirmed by the Court of Appeal (Swinfen Eady M.R., Warrington and Scrutton L.JJ.).

1920. May 4, 6, 7. *J. H. Cunliffe K.C.* and *Reginald Hills* (*Sir Gordon Hewart A.-G.* with them) for both appellants. The question is whether persons entitled to profits on foreign investments in respect of which they would otherwise be liable to be taxed are exempt from taxation on showing that they are trustees and that the beneficiary for the time being receiving the income is not domiciled in this country. For sixty years trustees have paid the tax on these profits if remitted to this country and since 1914 it is immaterial that the profits are not received in the United Kingdom. The respondents, as the legal owners of the property concerned, are the persons to whom the annual profits or gains arose and accrued therefrom within the meaning of Sch. D of s. 2 of the Income Tax Act, 1853, and are similarly the persons receiving or entitled to the profits under the general rule in s. 100 of the Income Tax Act, 1842. They are likewise persons residing in the United Kingdom. They are therefore assessable to income tax as the direct effect of the substantive charging provisions of the Income Tax Acts. The effect of s. 5 of the Finance Act, 1914, was to abolish the exception which under Cases 4 and 5 of Sch. D, s. 100, of the Income Tax Act, 1842, was made in respect of property situated abroad the income of which was not remitted to this country. Except in the proviso it did not affect the category of persons who were liable to be assessed. "Person" in the proviso must be understood to mean the person liable to assessment under the substantive charging sections of the Income Tax Acts. Before the Act of 1914 was passed the trustees would clearly have been assessable in respect of

income from shares remitted to them or received by them in the United Kingdom, and the effect of s. 5 is to make them assessable also in respect of dividends not so remitted or received. In other words, s. 5 merely increases the quantum of assessment.

In the charging sections of the Income Tax Acts no distinction is drawn between persons receiving as being absolutely entitled and persons receiving as trustees. No hardship arises upon this construction of the Acts. The trust is a British trust under the control of trustees resident and domiciled in the United Kingdom and it enjoys the protection of the jurisdiction of British Courts. But, further, in construing a taxing statute, if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to be: *Partington* v. *Attorney-General* (1); *Aikin* v. *Macdonald's Trustees* (2); *Foley* v. *Fletcher.* (3) Sect. 41 of the Income Tax Act, 1842, and the sections subsidiary thereto have no application to the present case. The only object of s. 41 is to provide machinery whereby a person who would normally be the subject of direct assessment but who by reason of incapacity or of being outside the jurisdiction or otherwise cannot conveniently be assessed shall be reached by assessment through a representative person. That section is a machinery section and not a taxing section and does not alter or affect the subsequent charging sections of the Act. It is limited to a class of trustees which does not include the trustees in this case: *Drummond* v. *Collins* (4); *Werle* v. *Colquhoun* (5); *Ex parte Huxley* (6); *Fry* v. *Shiels' Trustees.* (7) And see *Armitage* v. *Moore.* (8)

Disturnal K.C. with *A. M. Latter* for the respondents in the first case, and with *Bremner* for the respondents in the second case.

At the conclusion of the arguments on behalf of the

(1) (1869) L. R. 4 H. L. 100, 122.
(2) (1894) 3 Tax Cas. 306, 308.
(3) (1858) 28 L. J. (Ex.) 100, 106.
(4) [1915] A. C. 1011, 1019.
(5) (1888) 20 Q. B. D. 753, 760.
(6) [1916] 1 K. B. 788, 793.
(7) (1914) 6 Tax Cas. 583, 589.
(8) [1900] 2 Q. B. 363.

H. L. (E.) 1920 WILLIAMS v. SINGER. POOL v. ROYAL EXCHANGE ASSURANCE.

appellants, Viscount Cave intimated that as at present advised their Lordships did not require to hear the respondents' counsel, but that they would take time to consider their judgment.

1920. May 17. VISCOUNT CAVE. My Lords, the question raised in these appeals is whether income from foreign investments which is received abroad by a person not domiciled in this country is chargeable with income tax under the Income Tax Acts by reason of the fact that the investments stand in the names of trustees who are domiciled here. As the point raised in both cases is the same, the appeals have been heard together.

In *Williams* v. *Singer* the respondents are the trustees of a settlement under which the Princesse de Polignac is the beneficial tenant for life in possession. The settlement is in English form, and the trustees are all domiciled and resident in the United Kingdom; but the Princess (who is a widow) is a French subject by marriage, and is domiciled and resident abroad. The settled fund, so far as it comes into question in these proceedings, consists of certain foreign investments of considerable value, and under orders signed by the trustees the whole income from these investments is paid to the account of the Princess at a bank in New York, no part thereof being remitted to this country. In these circumstances the Additional Commissioners for the Division of New Sarum in the county of Wilts (in which one of the respondents resides) made two assessments upon the respondents for the year ended April 5, 1916—namely, an assessment of 60,000*l.* in respect of foreign possessions and an assessment of 5000*l.* in respect of foreign securities—these sums representing approximately the income from the foreign investments comprised in the settlement as above mentioned. The respondents objected to the assessments and appealed to the Special Commissioners who, after argument, discharged them; and on a case being stated for the opinion of the King's Bench Division Sankey J. confirmed the decision of the Special Commissioners. An appeal by the Surveyor of Taxes to the

Court of Appeal was dismissed, and the Surveyor has appealed to this House.

The facts in *Pool* v. *Royal Exchange Assurance* are in all material particulars (with one exception) similar to those in the other case. In this case the respondent company, which has its principal place of business in the City of London, is the trustee of the will of Mr. J. P. Mellor (deceased); and the beneficial tenant for life under the will is Mrs. H. P. Munthe, a Swedish subject domiciled abroad. The will comprises foreign investments; and the whole income from such investments is paid directly to Mrs. Munthe abroad, no part of such income being remitted to this country. The District Commissioners of Taxes for the City of London made assessments upon the respondent company in respect of foreign possessions of 2015*l.* for the year ended April 5, 1915, and 2018*l.* for the year ended April 5, 1916, these sums representing the income of the foreign investments above referred to. But these assessments differed from those which are in question in *Williams* v. *Singer* in one respect—namely, that instead of being made (as in that case) upon the trustees by name without reference to any trust, they were made upon the respondent company "as trustees under the will of J. P. Mellor deceased for beneficiary Mrs. H. P. Munthe." The respondent company appealed to the Special Commissioners, who discharged the assessments; and this decision also has been affirmed by Sankey J. and the Court of Appeal and is the subject of appeal to this House.

My Lords, it was decided in *Colquhoun* v. *Brooks* (1) (*a*) that the tax imposed by the Income Tax Acts, 1842 and 1853 (Sch. D, Cases 4 and 5), upon the income from foreign securities and possessions was leviable upon so much only of that income as was remitted to the United Kingdom. But that limitation was to some extent abrogated by s. 5 of the Finance Act, 1914, which (so far as material in this appeal) is as follows: "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the

(1) (1889) 14 App. Cas. 493.

H. L. (E.) 1920 — WILLIAMS v. SINGER. POOL v. ROYAL EXCHANGE ASSURANCE. — Viscount Cave. —

rules under the fourth and fifth case in section one hundred of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not . . . . and the provisions of the Income Tax Acts (including those relating to returns) shall apply accordingly, ... Provided that this section shall not apply in the case of a person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom."

It is obvious that, having regard to the proviso to the above section, the Princesse de Polignac and Mrs. Munthe, who are domiciled abroad, could not have been assessed to income tax in respect of the foreign income above referred to. But the revenue authorities contend that they are entitled to levy tax upon that income by means of assessments upon the trustees, who are domiciled in this country. If this contention is upheld, the trustees will of course be entitled to retain the tax so paid out of the trust income payable to the beneficial life tenants, who will thus have to bear the burden of the tax from which the proviso appears to relieve them; but the appellants contend that this is the effect of the statutes. The question to be determined is whether they have that effect.

In support of the above contention counsel for the appellants relied principally upon the language of Sch. D to the Income Tax Act, 1853, which provides that the duties thereby imposed are to be deemed to be granted and made payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and upon the first general rule in s. 100 of the Income Tax Act, 1842, which provides that the duties upon profits imposed by Sch. D are to be charged on and paid by the persons "receiving or entitled unto" such profits; and they contended that as the income in question in the cases under appeal "accrued" to the trustees as the legal holders of the investments, and the trustees are the persons legally

"entitled" to receive it, they are the persons chargeable under the Act. Indeed, I understood Mr. Cunliffe to go so far as to say that, when funds are vested in trustees, the revenue authorities are entitled to look to those trustees for the tax, and are neither bound nor entitled to look beyond the legal ownership.

My Lords, I think it clear that such a proposition cannot be maintained. It is contrary to the express words of s. 42 of the Income Tax Act, 1842, which provides that no trustee who shall have authorized the receipt of the profits arising from trust property by the person entitled thereto, and who shall have made a return of the name and residence of such person in manner required by the Act, shall be required to do any other act for the purpose of assessing such person. And, apart from this provision, a decision that in the case of trust property the trustee alone is to be looked to would lead to strange results. If the legal ownership alone is to be considered, a beneficial owner in moderate circumstances may lose his right to exemption or abatement by reason of the fact that he has wealthy trustees, or a wealthy beneficiary may escape super tax by appointing a number of trustees in less affluent circumstances. Indeed, if the Act is to be construed as counsel for the appellants suggests, a beneficiary domiciled in this country may altogether avoid the tax on his foreign income spent abroad by the simple expedient of appointing one or more foreign trustees. Accordingly I put this contention aside.

On the other hand, I do not think it would be correct to say that, whenever property is held in trust, the person liable to be taxed is the beneficiary and not the trustee. Sect. 41 of the Income Tax Act, 1842, renders the trustee, guardian or other person who has the control of the property of an infant, married woman, or lunatic chargeable to income tax in the place of such infant, married woman, or lunatic; and the same section declares that any person not resident in Great Britain shall be chargeable in the name of his trustee or agent having the receipt of any profits or gains. Sect. 108 of the same Act, which deals with the profits or gains arising

H. L. (E.) 1920

WILLIAMS v. SINGER.

POOL v. ROYAL EXCHANGE ASSURANCE.

Viscount Cave.

from foreign possessions or foreign securities, provides that in default of the owner or proprietor being charged, the trustee, agent or receiver of such profits or gains shall be charged for the same. And even apart from these special provisions I am not prepared to deny that there are many cases in which a trustee in receipt of trust income may be chargeable with the tax upon such income. For instance, a trustee carrying on a trade for the benefit of creditors or beneficiaries, a trustee for charitable purposes, or a trustee who is under an obligation to apply the trust income in satisfaction of charges or to accumulate it for future distribution, appears to come within this category; and other similar cases may be imagined.

The fact is that if the Income Tax Acts are examined, it will be found that the person charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable. If they are under the control of a guardian or committee for a person not sui juris or of an agent or receiver for persons resident abroad, they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax the statutes recognize the fact that he is a trustee or agent for others and he is taxed on behalf of and as representing his beneficiaries or principals. This is made clear by the language of many sections of the Act of 1842. For instance, s. 41 provides that a person not resident in Great Britain shall be chargeable "in the name of" his trustee or agent. Sect. 44 refers to the trustee or agent of any person as being assessed "in respect of" such person, and gives him a right to retain the tax out of any money of such person coming to his hands. Sect. 51, under which trustees and others are bound to make returns, refers to the event of the beneficiary being charged either "in the name of" the trustee or other person making

the return, or in his own name. Sect. 53 refers to the trustee or agent as being charged "on account" of the beneficiary; and similar expressions are found in other sections. In short, the intention of the Acts appears to be that where a beneficiary is in possession and control of the trust income and is sui juris, he is the person to be taxed; and that while a trustee may in certain cases be charged with the tax, he is in all such cases to be treated as charged on behalf or in respect of his beneficiaries, who will accordingly be entitled to any exemption or abatement which the Acts allow.

Applying the above conclusions to the present case, it follows in my opinion, first, that the respondent trustees, who have directed the trust income to be paid to the beneficial tenants for life and themselves receive no part of it, are not assessable to tax in respect of such income; and secondly, that even if they were so assessable, they would be assessable as trustees on behalf of the life tenants, who would accordingly be entitled to the benefit of the exemption contained in the proviso in s. 5 of the Finance Act, 1914. The assessments in question in *Pool* v. *Royal Exchange Assurance Co.*, which were made upon the respondents as trustees for the beneficiary Mrs. Munthe, and were probably so made with reference to ss. 41 and 108 of the Act of 1842, support this view of the Acts; but it does not appear to me that the absence of similar words in the assessments in *Williams* v. *Singer* makes any difference in the result.

The above conclusion is supported by the consideration that under the express words of s. 5 of the Finance Act, 1914, a person thereby charged with tax is authorized to deduct from the taxable income "any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom." It is difficult to believe that it was the intention of the Legislature, while exempting from the tax any definite part of the income which is payable to a person abroad, to impose the tax upon the whole income when so payable.

For the above reasons I think that the contention of the appellants fails, and accordingly that these appeals should be dismissed with costs.

H. L. (E.) 1920 — WILLIAMS v. SINGER. POOL v. ROYAL EXCHANGE ASSURANCE.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend on the Woolsack. I thoroughly concur in it, and I have nothing to add.

LORD SHAW OF DUNFERMLINE. My Lords, the address just delivered to the House from the Woolsack so fully and exactly expresses the opinion I have formed that I agree, without adding anything.

LORD WRENBURY (read by LORD ATKINSON). My Lords, in the decision of this case it is essential to bear in mind (1.) that the income with which we are concerned is derived from foreign securities or foreign possessions; (2.) that no part of it is received in this country; (3.) that the beneficiary to whom it is paid is a foreign subject neither domiciled nor resident in the United Kingdom; and on the other hand that (4.) the trustees are domiciled and resident in the United Kingdom.

The appellants initiate their contentions by pointing out quite accurately that s. 100 of the Act of 1842 to which they point as being the charging section, charges annual profits or gains accruing to any person whether a subject of His Majesty or not although not resident in the United Kingdom from property in the United Kingdom, and that by Cases 4 and 5 duty is to be charged in respect of interest arising from foreign securities or foreign possessions and is to be computed upon the sums received in Great Britain. The duties are to be charged upon the persons "receiving or entitled unto the same." So far, therefore, a foreign subject resident in this country is chargeable upon income of foreign securities or foreign investments received in this country, but a foreign subject resident abroad and receiving the income abroad is not chargeable. This position, however, they say was altered by s. 5 of the Finance Act, 1914, when it provided that income tax in respect of income arising from foreign securities shall, notwithstanding anything in the rules under Cases 4 and 5 in s. 100 of the Act of 1842,

be computed on the full amount of the income whether received in the United Kingdom or not. But the effect of s. 5 of the Act of 1914 so far would seem to be only that where there is a person chargeable in respect of income arising from foreign securities he is to be charged not as the Act of 1842 had provided upon so much as is received in the United Kingdom but upon the full amount whether received in the United Kingdom or not. The appellants, however, seek to find in words of enlargement of the income charged an enactment affecting the characteristics of the person chargeable. I do not think that is the effect of s. 5 of the Act of 1914. The two things are quite distinct; the property chargeable is one thing, the person liable to be charged is another. Sect. 5 affects the former but not the latter. But the matter does not stop there, for s. 5 concludes with a proviso which excludes from its operation a person not domiciled in the United Kingdom or being a British subject not ordinarily resident in the United Kingdom. In other words, if the "person" there referred to is the beneficiary, then s. 5 does not apply to the beneficiary in the case before your Lordships, and if it were sought to assess her the matter would remain as it was under the Act of 1842, and she would not be assessable for she is a foreign subject and the income is not received in this country.

But next the appellants say that the persons assessable are not the beneficiary but the trustees, the persons legally entitled to the income. Sect. 2 of the Income Tax Act, 1853, provides, as regards Sch. D, that for or in respect of annual profits accruing to any person residing in the United Kingdom from any kind of property whatsoever whether situate in the United Kingdom or elsewhere, a certain duty shall be paid. The trustees they say are "persons" within these words, they are assessable, and the foreign subject must suffer the tax in consequence. My Lords, I am not of this opinion. It is not necessary in this case to investigate the question whether trustees are in any case assessable. I express no opinion that they are not. The case was put of a trust for accumulation of income for an infant contingently on his

H. L. (E.)
1920
WILLIAMS
v.
SINGER.
POOL
v.
ROYAL
EXCHANGE
ASSURANCE.
Lord Wrenbury.

attaining twenty-one, a case in which there is not in existence a beneficiary presently entitled to the income, and s. 14 of the Finance Act, 1917, was referred to as showing, as no doubt is the case, that nevertheless someone must be liable in respect of the tax, and it was said this would be the trustees. I do not concern myself with this matter. It is not this case. There is here a beneficiary of full age and not under disability. Is the tax recoverable upon the footing of the domicil and nationality of the beneficiary or of the trustees? That is the question. Upon this question s. 41 et seq. of the Act of 1842 are most material. Sect. 41 deals with two cases—namely, (1.) beneficiaries under disability, and (2.) persons not resident in the United Kingdom whether subjects of His Majesty or not. In the former case the trustee is to be chargeable in like manner and to the like amount as would be charged if the beneficiary were not under disability. In the latter case the beneficiary is to be chargeable in the name of the trustees and the trustee is to be answerable for doing such acts as shall be required for "the assessing of any such person." Here, therefore, are particular cases in which the trustee is to be dealt with in manner provided by this section. The case of a beneficiary not under disability and resident in and not out of the United Kingdom is not dealt with in any similar manner, and why? Presumably because such a person is to be dealt with by assessment in his own name. Sect. 42 is one which discharges a trustee who returns a certain list disclosing the person who actually receives the income from responsibility for doing any other act "for the purpose of assessing such person," i.e., the beneficiary. Sect. 44 is one which entitles the trustee of a person under disability and who is assessed "in respect of such person" to retain money sufficient to pay the assessment. These sections point to the conclusion that the person to be taxed is the beneficiary, not the trustee, and none the less because under certain circumstances the beneficiary is to be reached through the trustee. If the trustee is a foreign subject resident abroad but the beneficiary is in the United Kingdom taxation will not be escaped, and if the trustee is a British

subject resident in the United Kingdom but the beneficiary is a foreign subject resident abroad taxation is not imposed by reason of those facts.

My Lords, no one can say that the Income Tax Acts are easy reading, but upon the question before your Lordships their effect is, I think, reasonably plain. I agree with the judgments given below, and am of opinion that this appeal fails and should be dismissed.

LORD PHILLIMORE. My Lords, the facts in the case of *Williams* v. *Singer* are as follows. The respondents are the legal owners of the investments in question, and entitled at law to receive the income from them, but they hold the investments and the title to the income as trustees under the marriage settlement of the Princesse de Polignac, a lady apparently of American extraction who has married two French nobles in succession, and is now a widow. Under the various instruments, which include two marriage settlements, and the release of a power of appointment contained in the first, the trustees in the events which have happened hold the property on trust, to pay the income to the Princess during her life, and then to the children, if any, as to which your Lordships are not informed, of the marriage, and, failing children, to such persons as the Princess should by will appoint, and, subject thereto, for the brothers and sisters of the Princess. There are some subsidiary provisions in the deeds, which were relied upon by counsel for the appellant, but I do not think that any of your Lordships were impressed by them. The Princess is a French subject, and is not resident in the United Kingdom. The respondents instructed a bank in New York to collect and receive the dividends on the shares in the Singer Company, and to credit them to the account of the Princess with the same bank. These dividends have not been remitted to or received in the United Kingdom. Upon this set of facts Sankey J. decided as follows (1): "In my opinion it is not possible to make a trustee liable for income tax to be paid out of the moneys of the cestui que

(1) [1918] 2 K. B. 749, 757.

H. L. (E.)
1920
WILLIAMS
v.
SINGER.
POOL
v.
ROYAL
EXCHANGE
ASSURANCE.
Lord Phillimore.

trust when the cestui que trust is himself not liable. The machinery of s. 41 (of the Act of 1842) is machinery by which, through a trustee, a person who is liable for income tax can be reached. The residence of a trustee is not visited upon the cestui que trust so as to make the latter liable for income tax when he would not otherwise be so liable."

In the Court of Appeal, the Master of the Rolls expressed himself as follows (1): "It was argued for the Crown that this section (s. 41 of the Act of 1842) did not extend to a case in which a trustee was legal owner, and was merely inserted in the statute to include cases where a trustee, not being legal owner, nevertheless had 'the direction, control or management.' This contention, however, is not well founded. A trustee for a married woman is a person who is usually the legal owner of the property to which the married woman is beneficially entitled. I am of opinion that the view expressed by Mr. Justice Sankey was well founded, and that s. 41 is mere machinery by which a person who is liable for income tax can be reached through the trustee or other persons mentioned in the section. The residence of the trustee is not a determining factor to render liable to income tax a person who would not otherwise be liable, or through the medium of a trustee to render income liable to tax which would not be so liable in the hands of the beneficiary himself. The income in question does not in my opinion fall within 'annual profits or gains accruing to any person residing in the United Kingdom' within the meaning of Sched. D. This income accrues to a foreigner residing abroad, and the fact that there are English trustees residing here does not bring this income into charge." He also relied upon the proviso at the conclusion of s. 5.

Warrington L.J. held that it was the liability of the beneficiary which was to cover that of the trustee, and that, in consequence, as the beneficiary was not resident within the United Kingdom, the trustees were not liable. But he went further and considered the general question of the liability of trustees to assessment and taxation, and expressed himself

(1) [1919] 2 K. B. 108, 115.

as follows (1): "Is a trustee residing in the United Kingdom liable to be taxed on gains and profits accruing to him in which he has no beneficial interest? In my opinion the provisions contained in the sections dealing with trustees in the Act of 1842 show clearly enough that the person liable to be taxed is the beneficiary and not the trustee, and that the provisions of s. 41 are mere machinery by which, in the cases there specified, the tax may be the more readily recovered." And again: "It is to be observed that the section makes no provision for assessing a trustee for a person not under disability and resident in this country." He also relied upon the proviso. Scrutton L.J. (2) thus expressed himself: "The conclusion I draw from these involved sections is that Parliament was endeavouring to put the burden on the beneficial owner, and only used the trustee as machinery to get at the person who had the benefit of the income. The trustee was only to be assessed 'in respect of' the cestui que trust (s. 44), 'on account of such other person' (s. 53), 'on behalf of the other person' (s. 55). The person to whom the property belongs is to be charged in the name of the trustee (s. 51) . . . . It follows that in my opinion when Parliament exempted a class of persons from the operation of the statute of 1914, s. 5, they were at any rate including the beneficial owner or cestui que trust, if he came within the description of the class. The cestui que trust in each of the present cases is not domiciled in England and therefore in my view comes within the protection of the proviso and is not bound to pay on her whole income but only on that part which her trustees receive in England. The word 'person' in the proviso in my view includes a beneficial owner or cestui que trust who can satisfy the requirements of the proviso." The Lord Justice was also inclined to think that the same result might be arrived at by treating the payment to the cestui que trust as an annual payment out of the income to a person resident out of the United Kingdom under the earlier part of s. 5.

The points raised by the judgment of the Court of Appeal cover a wide field, and the arguments of the counsel for the

(1) [1919] 2 K. B. 117, 118. (2) [1919] 2 K. B. 123.

H. L. (E.) 1920 — WILLIAMS v. SINGER. — POOL v. ROYAL EXCHANGE ASSURANCE. — Lord Phillimore.

appellants have of necessity traversed the same ground; but at the conclusion of the argument for the appellants, your Lordships were of opinion that it would not be necessary for the purpose of deciding this case to express your opinion upon some of the points raised. It was suggested by counsel for the appellants that the Income Tax Acts, except in certain special and rather narrow instances, took no account of the position of trustees, but regarded only the legal ownership. On the other hand, from some of the language in the judgments of the Court of Appeal, especially that of Warrington L.J., it would appear that a contention that the Income Tax Acts looked generally to the beneficiary, and disregarded the trustee, except as a means of reaching the beneficiary in certain rare cases, had found favour. I do not propose to express an opinion whether either, or which if either, of these two extreme views is right.

The charge is laid upon the taxpayer by the first section of each taxing Act: "For and in respect of the annual profits or gains arising from or accruing to any person or persons whatever, resident in the United Kingdom, from any kind of property whatever." For the purpose of ascertaining the person to be charged by s. 5 of the Act of 1914, your Lordships have to determine who are the persons charged either by the words just quoted or by any additional provisions in the later sections of the Act of 1842.

I think it convenient to mention first that s. 43 adds to the list of persons charged a receiver appointed by a Court, though not a person otherwise chargeable in himself, this being a very convenient provision for insuring that the person ultimately found to be the owner shall pay.

Then comes s. 41, which also adds to the list of persons who are not owners under any construction but yet are to be charged, the guardian of an infant, or the curator or committee of an insane person, whether the infant or insane person reside in Great Britain or not, and the factor, agent or receiver of a person not resident in Great Britain. These are unquestionable additions. Then in the same section and in the same relation is inserted the trustee of a married woman

certainly, possibly also the trustee for an infant or insane person. If the trustee, as being the legal owner, is already chargeable, under the general section, there would be no necessity for his insertion into this section. It was attempted to escape from the force of this argument by a suggestion that the word "Trustee" did not mean trustee, but something else. The Master of the Rolls expressed himself upon this point in words which I have already quoted. I find it rather difficult to express my rejection of the argument in respectful language. The very essence of the position of a trustee is that he is a person who at law has all the rights of an owner, but who has nevertheless the obligation, which he has undertaken by accepting the trust, of using his powers as legal owner for the benefit of some person not himself or some object not his own.

As to married women, the Act of 1842 was passed long before the modern Married Woman's Property Acts; and the one case where, under the law, as it then stood, a married woman could be treated as the legal owner or as in a position equivalent to that of a legal owner is especially provided for by s. 45.

It remains therefore that the argument from this section is a forcible one. In certain specified cases the trustee, in common with the guardian and committee, is made chargeable to income tax in like manner and to the same amount as would be charged if the infant were of full age, or the married woman were sole, or the insane person capable of acting for himself.

But for this section the guardian or committee would not be liable.

Sect. 42 provides that: "no trustee who shall have authorised the receipt of the profits arising from trust property by the person entitled thereunto . . . . nor any agent or receiver of any person being of full age, and resident in Great Britain, (other than a married woman, lunatic, idiot, and insane person") who returns a list giving the name and residence of such person shall be required "to do any other act for the purpose of assessing such person," unless the Commissioner requires his evidence. Be it observed the provision is not that a trustee, agent or receiver, who furnishes a list, shall be released from

H. L. (E.) 1920

WILLIAMS v. SINGER.

POOL v. ROYAL EXCHANGE ASSURANCE.

Lord Phillimore.

assessment and charge, but that he is not to be required to do anything more for the purpose of arriving at the assessment of the person to be charged.

By s. 51 : " every person who shall be in receipt of any money or value or the profits or gains arising from any of the sources mentioned in this Act, of or belonging to any other person . . . . for which such other person is chargeable," shall deliver a list " with a declaration whether such person is of full age, or a married woman living with her husband, or a married woman for whose payment of the duty hereby charged on her the husband is not accountable by this Act, or resident in Great Britain, or an infant, idiot, lunatic, or insane person, in order that such person . . . . may be charged either in the name of the person delivering such list, if the same shall be so chargeable, or in the name of the person to whom such property shall belong, if of full age, and resident in Great Britain, and the same be so chargeable by this Act."

Further light is thrown upon this matter by the provisions of s. 108, for regulating the mode in which duty in respect of profits or gains arising from foreign possessions or foreign securities is to be assessed. The section contains a provision in the following words : " in default of the owner or proprietor thereof being charged, the trustee, agent, or receiver of such profits or gains shall be charged for the same . . . . whether the person to whom the said profits belong shall be resident in Great Britain or not."

Who is the person to whom the profits belong, and who is called the owner or proprietor, and in default of whom the trustee is to be charged ? Surely the beneficiary, the owner in equity.

Putting these sections together, it would appear that trustees in the cases provided for in s. 41 and s. 108 are made the persons assessable and liable, but that no trustee who has authorized the receipt of the profits from the trust property by the person entitled is assessable or liable, he being bound only to the discharge of the obligations imposed upon him by s. 42.

It may perhaps be said that where there is a trust for

accumulation or for payment of debts, no person can be said to be entitled to the receipt of the profits, and that in such cases the trustee is to be the person to be assessed. It is possible also that where trustees have the management of a business they should be the persons to be assessed or charged. There are disbursements which may have to be made in the course of conducting a business which a prudent owner would consider as deductions from profits, and which trustees would make before they paid the net income over to the beneficiary, but which nevertheless for income tax purposes, as the law at present stands, are not considered as legitimate deductions from income—cases of which the decision of this House in *Strong & Co.* v. *Woodifield* (1) is an example. In these cases if the revenue is to receive its full quota it would seem that the assessment must be put upon the trustee and not upon the beneficiary, and that in such cases the trustee is the person to be assessed.

The case now before your Lordships is not one of such cases. The trustees here merely exist in order to preserve the settlement. Their duty, so long as the Princesse is alive, is to see that the dividends reach her. In law they are entitled to them, and they must give the discharge to the company, but the person entitled within the meaning of s. 42 and the person to whom they belong within the meaning of s. 51 is, as it appears to me, the Princesse.

These considerations might be enough to decide the case in favour of the respondents; but I think that the proviso of s. 5 of the statute of 1914 may fairly be relied upon as an indication that the statute did not intend to reach a person in the position of this lady.

Lastly, while as at present advised, I am inclined to agree with counsel for the appellants that the words in the earlier part of the section: "a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom" are not meant to cover the case where a trustee in this country is bound to pay the whole income to a person

(1) [1906] A. C. 448.

H. L. (E.) 1920

WILLIAMS v. SINGER.

POOL v. ROYAL EXCHANGE ASSURANCE.

Lord Phillimore.

outside, still, I think that the words are useful as supporting the general sense of the conclusion at which I have arrived. If the income which the Princesse is to receive for these shares had been charged, say by the person who first gave them to her, with an annuity in favour of an old servant residing in America, it seems to me that this annuity could be deducted from the income liable to tax, and it would be strange if this were so and yet the residue of income also received by a person residing out of the United Kingdom were liable to tax. I agree that this appeal should be dismissed.

The case of *Pool* v. *Royal Exchange Assurance* should be determined on the same grounds, and I agree that the appeal also in this case should be dismissed.

Order of the Court of Appeal affirmed in each case and appeal dismissed with costs.

Lords' Journals, May 17, 1920.

Solicitor for the appellants: *H. Bertram Cox, Solicitor of Inland Revenue.*

Solicitor for the respondents, Singer and Others: *Charles Russell & Co.*

Solicitors for the respondents, the Royal Exchange Assurance: *Burton, Yeates & Hart.*

[HOUSE OF LORDS.]

COUNTY HOTEL AND WINE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

H. L. (E.)*
1920
July 9.

Railway — Lease — Covenant — Refreshment Rooms — Option of renting — Construction.

In 1853 a certain railway company, who were the predecessors of the defendants, demised some land adjacent to one of their railway stations to a lessee for 999 years upon the terms that he should erect and keep a hotel thereon. The lease contained a covenant by the railway company that the tenant or occupier of the said hotel should have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations therein mentioned "in preference to any other party, it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms."

The plaintiffs occupied the hotel as assignees of this lease. They also occupied the refreshment rooms as yearly tenants, until the defendants, who had succeeded to all the rights and liabilities of the railway company, gave notice to the plaintiffs to quit, and determined their tenancy, purposing themselves to take over the management and control of the refreshment rooms. The plaintiffs, having obtained an assignment of the original lessee's rights under the above covenant, claimed a declaration that the defendants were under an obligation to put and keep the occupier of the hotel in occupation of the refreshment rooms :—

Held (by Viscount Haldane, Viscount Cave, Lord Shaw of Dunfermline and Lord Moulton; Viscount Finlay dissenting), that the true meaning and effect of the covenant was that if and when the railway company were minded to offer the refreshment rooms at a rent to any one, the occupier of the hotel should have the option of taking them at that rent; but that if the railway company themselves undertook the supply of refreshments the occupier of the hotel had no such option.

Decision of the Court of Appeal [1919] 2 K. B. 29 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of McCardie J. (2)

The facts are fully stated in the report of the case before

* *Present :* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, and LORD MOULTON.

(1) [1919] 2 K. B. 29. (2) [1918] 2 K. B. 251.

H. L. (E.) 1920 — COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO.

the Court of Appeal and in the judgment of Viscount Finlay and are summarised in the headnote.

McCardie J. held upon the point of construction that the option clause applied, not only where the railway company desired to let their refreshment rooms to third parties, but also where the railway company proposed to occupy and conduct the refreshment rooms themselves, but he held further that the option clause was void (*a*) as being ultra vires, and (*b*) for uncertainty. He therefore gave judgment for the defendants (the respondents).

On appeal the Court of Appeal (Bankes, Warrington and Duke L.JJ.) decided upon the question of construction that the option clause had no application where the railway company proposed to occupy the refreshment rooms themselves and they did not deal with the other points raised by the learned judge. They therefore affirmed the judgment of McCardie J., but on different grounds.

On the appeal to this House their Lordships intimated that they would hear the question of construction first and the decision of the House turned solely upon that question. It is therefore unnecessary to report the arguments of counsel.

1920. July 8, 10. *Langdon K.C.* and *Eustace Hills K.C.* (with them *MacSwinney*) for the appellants.

Disturnal K.C. (with him *Barrington Ward K.C.* and *Arthur Underhill*) for the respondents.

Langdon K.C. in reply referred to *Dawes* v. *Tredwell* (1); *Flanagan* v. *Great Western Ry. Co.* (2); *Mackenzie* v. *Childers.* (3)

The House took time for consideration.

1920. July 9. VISCOUNT HALDANE (read by LORD SHAW). My Lords, the preliminary question that lies at the foundation of this appeal has been fully argued. It is not necessary for me to restate the facts, because, if the view of the case which I have formed is correct, the only

(1) (1881) 18 Ch. D. 354. (2) (1868) L. R. 7 Eq. 116.
(3) (1889) 43 Ch. D. 265.

point which it is necessary to determine is one of the construction of certain words in a covenant. There were several other questions which were discussed before McCardie J., but if the Court of Appeal was right in the conclusion it came to about the question of construction to which I am referring no one of these other questions arises.

By a lease made in 1853 the Lancaster and Carlisle Railway Company, who were the predecessors in title of the respondents, demised a parcel of land close to Carlisle Station to the predecessors in title of the appellants for 999 years, and the latter undertook to build an hotel on it. This undertaking was carried out. The hotel was to be conducted so as to afford accommodation for persons arriving at the station. The railway company covenanted on their part to build and keep in repair a certain covered passage as a communication between the hotel and the platform of the station, provided the tenant of the hotel was also tenant of the refreshment rooms on the station. It was further declared by the lease to be the wish and intention of the parties to the lease that the tenant or occupier of the said hotel should have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations to be from time to time fixed by the Committee for the management of the Carlisle Joint Station in preference to any other party, it being the intention and wish of the parties that the same person should have the option of occupying the said hotel and refreshment rooms.

This clause went on to say that nothing in the lease was to give to the lessee or his successors in title any right of ingress into or passage through the refreshment rooms or any right to the use of this covered passage, unless and only so long as the occupier of the hotel should be the occupier of the refreshment rooms.

My Lords, subsequently to the date of this lease, apparently before 1859, the predecessors in title of the respondents granted a lease for twenty-one years of the refreshment rooms to a sub-lessee of the original lessee. This lease became vested in the appellants, who, from the date of its expiry,

H. L. (E.) 1920 COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. Viscount Haldane.

continued on as yearly tenants of the refreshment rooms. In 1916 the respondents became minded to take the refreshment rooms into their own hands, and gave notice to the appellants to determine the tenancy.

The question now to be decided is whether the respondents had the right to give this notice, or whether the appellants are entitled to claim a new or continued tenancy. They have brought an action for a declaration of the title, and for the fixing of a rent, and for damages, and it is in that action that this appeal arises. The Court of Appeal decided adversely to the appellants on the ground that all that the language of the covenant I have quoted amounted to was this. If the respondents desired to offer a lease of the refreshment rooms to any one, the appellants should have the right of being their tenants, but if the respondents desired not to make any lease but themselves to occupy and run their own refreshment rooms, they were free to do so, as the words of the covenant did not provide for such a case.

My Lords, I have arrived at the conclusion that the judgment of the Court of Appeal on this question was right. All that the words used say is that the occupier of the hotel is to have an option of "renting," in preference to any other party, it being explained to be the intention and wish of the parties that the same person should have the option of occupying both the hotel and the refreshment rooms. This provision appears to me to refer to occupation in the capacity of a person "renting," and therefore to cover only the case of a lessee from the respondents, as distinguished from that of the owners of the station occupying their own property in that capacity if they chose to abstain from letting to any tenant. The reference to an option would be expected if the committee had to settle a rent and rules and regulations for the case of a tenant. A definite subject-matter for an option may be so arrived at, including, I think, a duration, to be assigned for the tenancy. But if the tenant of the hotel is to be regarded as entitled to claim a lease of the refreshment rooms from the respondents, throughout what period of time is he to be held entitled to claim it? The

only term that appears to be possible on such a construction is one concurrent with the duration of the lease of the hotel, amounting still to over 900 years, during which the respondents would have excluded themselves from the possession of all of the refreshment rooms wherever they might have been built in their station. I do not think that it is probable that the predecessors in title of the respondents have meant to bind themselves to this. Whether they thought of the point or not in 1853, they have used words which at all events appear to me to cover no more than the case of any proposal that might be made by the owners of the station to let the refreshment rooms in it, in which case it seemed reasonable that the tenant of the hotel should be given a title to preference as such a tenant, especially as the covered passage was of importance to him. The same person as is occupier of the hotel and not any other party will then be lessee of the passage and refreshment rooms. For these reasons I have come to the conclusion that the conjunction of the expressions "tenant" and "occupier" early in the clause shows that by "occupier" in the concluding words is meant the same thing as "occupier" as a "tenant," and not "occupation by the proprietor," whose occupation is just his normal possession. When it is said that an occupier of the hotel is to have an option of renting in preference to any other party I think what is meant is what the words when naturally construed mean, renting by a tenant. I am unable to agree with the view that so to construe the words means to imply any limitation on that which the words taken by themselves express.

For the reasons given, I think the construction adopted by the Court of Appeal has the decisive merit that it implies nothing that is not expressed. I am therefore of opinion that the appeal should be dismissed with costs.

VISCOUNT FINLAY. My Lords, the question in this case is whether the respondents have committed a breach of covenant by refusing to let to the appellants the refreshment rooms at the Carlisle Station.

H. L. (E.) 1920 COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. Viscount Finlay.

The station was built under powers obtained before 1853 by the Lancashire and Carlisle Railway Company predecessors in title of the respondents. The station is, and always has been, managed by a joint committee of the companies by which the station is used. Adjacent to the station itself is a piece of ground acquired by the railway company, which was not wanted for the station, and on this piece of land the Station Hotel was built by George Head Head, to whom a building lease, dated August 1, 1853, was granted by the railway company for 999 years from its date. The lessee covenanted to pay an annual rent of 60*l.* and a further rent of 8*l.* a year so long as the lessee or his assigns should be entitled under the lease to use a covered way shown on the plan annexed to the lease as leading from the hotel to the station platform. The lessee covenanted to build a first-class hotel upon the land demised, and that he would not assign or let the demised premises without the consent of the railway company except to a tenant from year to year or for a term not exceeding twenty-one years. There was a provision for pre-emption by the railway company in the event of the lessee desiring to use the land otherwise than for purposes of a railway station hotel. The railway company covenanted with the lessee to build a covered way from the hotel to the station as shown on the annexed plan and further bound themselves as follows: "and will at all times hereafter during the continuance of the said term if the tenant of the said Hotel shall also be the occupier of the refreshment rooms maintain and keep the said passage in good repair for the use of the said George Head Head his executors administrators or limited assigns or his or their tenant of the said Hotel being also tenant of the said refreshment rooms as a communication between the said Hotel and the platform of the said Citadel Station during so much of the said term as the tenant of the Hotel shall continue tenant of the refreshment rooms."

The lease also contained another covenant on the construction of which the case turns. It runs as follows: "And the said Company for themselves and their successors and assigns do hereby covenant with the said George Head Head

his executors administrators and limited assigns that the said Company and their successors and assigns shall permit the tenant or occupier of the said Hotel for the time being and his servants to have access to the platforms of the said station in the same manner and under the same rules and regulations and restrictions as is now permitted by the London and North Western Railway Company to the occupier of the Euston and Victoria Hotels in reference to the Euston Station platforms of the London and North Western Company and that the tenant or occupier of the said Hotel shall have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations to be from time to time fixed by the Committee for the management of the Carlisle Joint Station in preference to any other party it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said Hotel and refreshment rooms but it is hereby declared that nothing herein contained shall give to the said George Head Head his executors administrators or assigns any right of ingress into or passage through the said refreshment rooms or any right to the use of the said covered passage unless and only so long as the occupier of the said Hotel shall also be the occupier of the said refreshment rooms."

The hotel and covered way were duly erected.

The appellant company was registered in 1864 and became the assignees from Mr. Head Head of the lease of August 1, 1853, and of a sub-lease of the hotel to one Benjamin Breach for twenty-one years, and also of a lease of the refreshment rooms from the railway company to him for the same term. Down to 1916 the appellants held and managed the hotel and the refreshment rooms. The refreshment rooms were held by them first under the twenty-one years' lease and from 1860 onwards at first under an agreement for an extension of two years and thereafter on yearly tenancy. During the whole of this time they enjoyed the use of the covered way between the hotel and the station.

On March 24, 1916, the respondents and the station committee served upon the appellants a notice requiring them

H. L. (E.) 1920 — COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. — Viscount Finlay.

to give up possession of the refreshment rooms, and on September 29, 1916, the appellants, under this notice, gave up possession of the refreshment rooms, and the covered passage between the hotel and the station was closed.

The appellants had given notice of their desire to exercise the option of renting the refreshment rooms under the lease of 1853, and the present action has been brought to assert their right to a renewal under the option clause, the benefit of which had, on October 16, 1916, been assigned to the appellants by the representatives of the original lessee under the lease for 999 years. This special assignment was deemed necessary on the ground that the covenant giving the option was not one which would run with the land. The writ in the present action was issued on November 2, 1916. The case came, in the first instance, before McCardie J., who decided in favour of the respondents on the ground that the option clause was void for uncertainty and was also ultra vires. The opinion of the learned judge on the question of the construction of the option clause, was in favour of the appellants. The Court of Appeal confirmed his decision merely on the ground of the construction of the option clause, holding that it has no application to the case, inasmuch as the respondents have taken the refreshment rooms into their own hands instead of letting them to a tenant.

In your Lordships' House the argument has so far been directed solely to this question of construction. The objections on the grounds of uncertainty and the law against perpetuity have not been argued, the right to raise these points being reserved for argument if necessary after the decision of your Lordships' House on the question of construction.

The question which has been debated is as to the extent of the option given to the lessee of the hotel and his tenants under the lease. Is it confined, as the Court of Appeal thought, to conferring a preference as against any other parties who might desire to become tenants, or does it also enure for the benefit of the covenantee in the event of the railway company desiring to take possession of the refreshment rooms and conduct them for their own benefit?

The respondents have resumed possession of the refreshment rooms and are now conducting them on their own account.

It is agreed that in the improbable event of the railway company deciding to dispense with refreshment rooms at Carlisle Station altogether, the covenant would have nothing to operate upon, and it is not contended by the appellants that there is any obligation on the railway company to keep up the refreshment rooms in order that the tenants of the hotel may have the benefit of the option. The refreshment rooms are being kept up, but by the railway company themselves, and it is contended that the covenant for the option is limited in its scope by the words " in preference to any other party " and does not apply to such a case. But for these words it was conceded, and is clear, that the covenant would have given to the covenantee the option to become the tenant of the refreshment rooms whether the railway company proposed to occupy and manage them for themselves or to let them to tenants.

It was argued on behalf of the respondents that these words " in preference to any other party " cut down the scope of the covenant and prevent its having any application unless the refreshment rooms are to be let. I agree that the words " any other party " in this portion of the clause denote other candidates for the tenancy, but it appears to me that it is a mistake to argue that the statement that the option is to be in preference to any other candidate for the tenancy shows that the option is confined to the case of letting. All such candidates for the tenancy are, of course, included within the scope of the covenant for the option. They are specially mentioned as subject to the preference in favour of the covenantee under the lease merely because all parties in 1853 considered it probable that the railway company would let the refreshment rooms. These words are introduced not to limit the scope of the option but to emphasize its application to the course which was considered most likely to be followed by the railway company, and which, in fact, was continuously followed for about sixty years.

The words of the covenant which immediately follow

H. L. (E.) 1920 COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. Viscount Finlay.

appear to me to negative the idea that the effect of the covenant is to leave the railway company at liberty to oust the tenants of the hotel from the option of a tenancy of the refreshment rooms and the use of the covered way between the hotel and the platform by themselves resuming possession, "it being the intention and wish of the said parties hereto that the same person should have the option of occupying the said Hotel and Refreshment Rooms." These words exclude any reading of the covenant which would leave the lessee of the hotel entirely at the mercy of the railway company in this matter. The direct communication between the hotel and the station by a covered passage was, of course, of great value to the lessee of the hotel. By a covenant a little earlier in the lease, the material portion of which I have already stated, provision was made for the enjoyment of the covered way by the tenants of the hotel. The right of communication by the covered way between the hotel and the station must have been a substantial element in the bargain for the building lease. By the terms of that covenant the enjoyment of the covered way was made contingent on the tenants of the hotel being also the occupiers of the refreshment rooms. This is repeated and emphasized by the declaration at the end of the covenant for the option. This fits in perfectly with what appears to me to be the true construction of the covenant for the option, and illustrates the improbability of the respondents' contention that it was not to be within the power of the tenant of the hotel to fulfil the condition on which his right to the covered way depended by continuing his tenancy of the refreshment rooms.

The respondents' argument comes to this, that the covenant for option should be read as if it contained the words "so long as the railway company let the refreshment rooms." No such words occur in it and they cannot be implied from the words as to preference which are in aid and not in limitation of the option. These words as to preference are really superfluous as every option necessarily imparts a preference. A suggestion was made that to prevent the words being superfluous they should be read as meant to exclude from

the benefit of the covenant all other cases than that of letting by the railway company.

To this it appears to be a sufficient answer that there are no words of exclusion—there are no words to show that the intention was to exclude any cases which otherwise would have fallen within the covenant, and that the fair meaning of the words is merely to accentuate the efficacy of the option in the case thought most likely to occur. If the intention had been as suggested very different language would have been used.

For sixty years no question arose upon the point. It was in 1916 that the railway company contended that they might prevent the fulfilment of the condition attached to the enjoyment of the covered way by resuming possession of the refreshment rooms for themselves.

It has been suggested that the parties to the building lease may have proceeded on the assumption that it would be ultra vires for the railway company to carry on the business of the refreshment rooms, and that the lessee may have relied on this as making his position with regard to the option secure. Your Lordships were informed by counsel that in the fifties of last century the common practice was for railway companies to let out refreshment rooms at stations in order that the business of catering for the travelling public might be carried on by the tenant. It is conceivable that in reliance on the continuance of this practice the parties might have left the possibility of the railway company's taking over the refreshment rooms themselves unprovided for. I do not think that any hypothesis of this sort is consistent with the correct construction of the lease. To my mind the last words of the covenant giving the option show that it means that the tenant of the hotel should have the option of occupying the refreshment rooms as well, and that this right is not cut down by the words expressing that the option was to be "in preference to any other party." These words were introduced not to limit the covenant but to accentuate its application to what was regarded as the case most likely to occur.

H. L. (E.) 1920 — COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. — Viscount Finlay.

I agree with the construction which McCardie J. put upon this covenant, and think that the decision of the Court of Appeal was erroneous. In my view the covenant gives the tenant of the hotel the right to become tenant of the refreshment rooms as against the company who propose to take them into their possession.

In the event of your Lordships adopting this view the argument of the case would have to be resumed upon the other grounds of objection to the covenant on which the respondents rely.

LORD SHAW OF DUNFERMLINE. My Lords, so far as my own opinion is concerned I have given much consideration to the view so weightily urged by my noble and learned friend Lord Finlay; but after much reflection I have come to the opinion that the grounds stated in the judgment in the Court of Appeal are sound, and so far as this House is concerned I desire to state that I adopt in its entirety the opinion of the noble and learned Viscount [Haldane] which I have seen.

LORD MOULTON. My Lords, I am about to read the judgment of my noble and learned friend Lord Cave, with which I also concur.

VISCOUNT CAVE (read by LORD MOULTON). My Lords, the question to be now determined on this appeal is whether the covenant contained in the lease of August 1, 1853, and relied upon by the appellants confers upon the tenant of the hotel an option in any event of renting the refreshment rooms at Carlisle Station, or only a preferential right of renting them in the event of the railway company desiring to let. In considering this question the covenant may for the purpose of analysis only be divided into two parts—namely, the body of the covenant and the addition expressing the "intention and wish" of the parties.

If the body of the covenant had stood alone, I should not myself have felt any doubt that it gives no more than a preferential right or "first refusal" of a tenancy. The covenant is that the tenant of the hotel shall have the option

of "renting" the refreshment rooms on the terms mentioned "in preference to any other party"; and it appears to me that these latter words which qualify those which precede them must mean "in preference to any other party desiring to rent the rooms." There is no stipulation compelling the railway company to let the rooms, or forbidding it to keep them in its own occupation; and I do not think that such a stipulation can be implied. It is possible that in the year 1853, when the option was given, no one contemplated the possibility of the railway company itself selling refreshments. If so, this circumstance may explain why no provision was made for such a contingency, but it does not entitle the Court to supply the omission.

But the appellants rely on the addition to the covenant of the words "it being the intention and wish of the parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms," and contend that this addition either extends the meaning of the preceding covenant so as to convert it into an absolute and unqualified option of renting, or is itself to be construed as a further and independent covenant for such an option. If the addition could be construed as a covenant, there would be great difficulty in enforcing it, as (apart from other questions) it does not define the term for which or the rent at which the premises are to be occupied; but in fact it does not appear to me that the words relied upon were intended to take effect as a covenant at all. They amount to no more than a recital of the wish and intention with which the preceding covenant was entered into; and if a further covenant had been intended it would have been very differently framed. Nor can such a recital be used to modify or extend a grant which is itself free from ambiguity. To give to the clause the meaning contended for by the appellants would be practically to strike out from the covenant the words "in preference to any other party," and I do not think that this can be done.

It is urged that it is improbable that the lessee, when entering into an engagement to build a station hotel, would have been satisfied with a covenant which left it open to

H. L. (E.) 1920 — COUNTY HOTEL AND WINE CO. v. L. & N. W. RY. CO. — Viscount Cave.

the railway company to terminate at any time his catering rights in the station (with its attendant right of way through the passage) and itself to supply refreshments; but it may well be that, if he thought of this contingency at all, he was prepared to take the risk, and the fact that the rights have been continued for more than sixty years is evidence that the option (however construed) had value. On the other hand, it may be said to be not less improbable that the railway company would, in order to let a plot of surplus land at a rental of 60*l.*, deprive itself for a period of 999 years of all right of catering for its own passengers or of regulating the entrances to and exits from its station as it might from time to time think fit. But in fact considerations of this nature have very little bearing on the decision, which must turn on the actual terms of the lease.

Upon the whole I agree with the reasoning and decision of the Court of Appeal, and I think it unnecessary to consider the other formidable difficulties which would still stand in the way of the appellants if your Lordships should take a different view.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 9, 1920.

Solicitors for the appellants: *James & James.*
Solicitor for the respondents: *M. C. Tait.*

[HOUSE OF LORDS.]

BRITAIN STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

THE KING . . . . . RESPONDENT.

H. L. (E.)*
1920
July 12.

GREEN AND OTHERS . . . . . APPELLANTS ;

AND

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED . . . . . } RESPONDENTS.

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED . . . . . } RESPONDENTS.

Shipping—Collision—Requisition by Admiralty—Charterparty—Sailing without Lights under Admiralty Orders—Loss of Ship—"Consequences of hostilities or warlike operations"—Liability of Admiralty.

A steamship was requisitioned by the Admiralty on the terms of a charterparty which provided that the Admiralty should not be liable for the loss of the ship by any sea risk, but should take the risk of "all consequences of hostilities or warlike operations." On May 6, 1918, the steamship, while on a voyage with a cargo of iron ore, was lost at night by collision with another ship also carrying cargo when both ships were, in compliance with Admiralty regulations, being navigated without lights. No negligence was proved on the part of either vessel and the collision was proximately caused by the absence of lights. The Admiralty regulations were issued as a precaution against possible enemy action, but no submarines were known or suspected to be present at the time of the collision :—

Held, that there were no warlike operations of which the loss of the ship could be a consequence and that therefore the Admiralty were not liable.

Decision of the Court of Appeal [1919] 2 K. B. 670 affirmed.

* *Present :* VISCOUNT CAVE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD WRENBURY.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Insurance—Marine—War Risks—Sailing under Convoy—Loss by stranding—"Consequences of hostilities or warlike operations."

By a time policy a steamship was insured against perils of the sea and stranding and the policy contained the usual f.c. and s. clause. By another time policy the steamship was insured against the risks excluded by the f.c. and s. clause, including "all consequences of hostilities or warlike operations by or against the King's enemies." During the currency of these policies the steamship, one of four merchant ships carrying cargoes of cotton, while proceeding under convoy, ran upon a reef of rocks and became a total wreck. The vessels were zigzagging and were upon an unaccustomed course, the night was dark, and the currents were variable and of unknown direction and force. The master was under the orders of the naval officer in charge of the convoy and was not responsible for the course taken. There was no negligence on the part of either the master or the naval officer. The vicinity was infested by submarines but no submarine was known or suspected to be present at the time:—

Held (by Lord Atkinson, Lord Sumner, and Lord Wrenbury; Viscount Cave and Lord Shaw of Dunfermline dissenting), that the loss was not the proximate consequence of a warlike operation and consequently fell upon the marine underwriters.

Decision of the Court of Appeal [1919] 2 K. B. 670 affirmed.

THE first appeal arose out of the loss of the steamship *Petersham* on May 6, 1918, in consequence of a collision with the Spanish steamship *Serra* while both vessels were sailing without lights in obedience to instructions from the Admiralty. The other two appeals arose out of the loss of the steamship *Matiana*, on May 1, 1918, by stranding on a reef while sailing under convoy. The question for determination in each case was whether the loss was a consequence of hostilities or warlike operations or was caused by perils of the sea.

THE PETERSHAM CASE.

The following statement of facts is taken from the opinion of Viscount Cave:—

"This vessel, which belonged to the appellants, the Britain Steamship Co., was at the date of her loss in charter to the Admiralty under a time charter in the form known as T. 99. The charterparty contained the following clauses: '18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or

tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk. 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar but not more extensive clause: Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.' On the night of May 6 the *Petersham* was on a voyage from Bilbao to Glasgow with a cargo of iron ore and in accordance with an Admiralty regulation made under the Defence of the Realm Regulation No. 37, was proceeding without navigation lights. At 11.20 P.M., when off Trevose Head in Cornwall, she was run into and sunk by a Spanish merchant vessel, the steamship *Serra*, which was on a voyage from Swansea to Bilbao with a cargo of patent fuel. The *Serra* was also sailing without lights; and the case has been argued upon the footing that she also was bound by the Admiralty regulation to dispense with navigation lights. The night was very dark, and it has been found that owing to the absence of lights the collision could not have been avoided by the exercise of reasonable care and skill on the part of those on board the two vessels. There is nothing to show for what purpose the iron ore was intended to be used, nor is there any evidence that any hostile vessel was, or was believed to be, in the neighbourhood at the time of the collision. A petition of right brought by the owners of the *Petersham* against the Crown for reimbursement was dismissed by Bailhache J. (1) on the ground that the loss of the vessel was not a consequence of hostilities or warlike operations within the meaning of clause 19 of the charterparty, but fell within clause 18, and his decision was affirmed by the Court of Appeal. (2) The owners have appealed to this House."

May 7, 10, 11, 13, 14. *MacKinnon K.C.* and *R. A. Wright K.C.* (with them *Dunlop K.C.*) for the appellants.

(1) [1919] 1 K. B. 575. (2) [1919] 2 K. B. 670.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

The collision which resulted in the loss of the *Petersham* was due solely to the ships being deprived of their lights in consequence of the Admiralty regulations. In those circumstances the effective cause of the loss was a consequence of hostilities or warlike operations within the illustrations given by Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (1), though the actual decision in that case was that the proximate cause of the loss (which was by stranding) was not the hostilities but the master's being out of his reckoning. Where the marine risk of stranding or collision is actuated by hostilities it ceases to be a marine risk and becomes a war risk. *British and Foreign Steamship Co.* v. *The King* (2) governs this case. There is no real distinction in the fact that in that case one of the colliding ships was a warship, or in the fact that the ship that was lost was employed to carry troops or munitions; and in that case it was admitted by the then Attorney-General (Sir F. E. Smith) that sailing without lights in obedience to Admiralty instructions was a warlike operation. The observations of Rowlatt J. and of Swinfen Eady M.R. are directly in point. That decision was followed by Roche J. in *Inui Gomei Kaisha* v. *Attolico* (3) and by Bailhache J. and the Court of Appeal in *Ard Coasters, Ld.* v. *The King* (4) and *S.S. Richard de Larrinaga* v. *Admiralty Commissioners* (5): and see *Owners of S.S. Larchgrove* v. *The King* (6) and *Henry and MacGregor* v. *Marten.* (7) "The consequences of hostilities" refers to an inquiry which may take place when a ship is in collision or is stranded—namely, was that collision or that stranding due directly to conditions of war?: *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (8); and see as to the construction of the f.c. and s. clause *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (9) The order of the Admiralty

(1) (1863) 14 C. B. (N. S.) 259, 285–6.
(2) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(3) Lloyd's List, July 20, 1918.
(4) (1919) 35 Times L. R. 604; (1920) 36 Times L. R. 555.
(5) [1920] 1 K. B. 700; [1920] 3 K. B. 65.
(6) (1919) 36 Times L. R. 108.
(7) (1918) 34 Times L. R. 504.
(8) [1918] A. C. 350.
(9) [1904] A. C. 359.

under which the *Petersham* was sailing without lights was a warlike operation or a consequence of hostilities ; as also was the sailing without lights in compliance with that order. It was a consequence of a state of war. The vessels were navigating within the sphere of the blockade set up by the belligerent Germans and the Admiralty regulations were a counter-measure adopted by the British Government to meet that blockade. This was a defensive action taken to meet the enemy's deliberate attack on the commerce of this country, which was at that time their most effective mode of warfare.

Sir Gordon Hewart A.-G. and *Norman Raeburn K.C.* for the respondent. The appellants must establish that this loss was a consequence of hostilities or warlike operations. "Hostilities" can have no application. The word means hostile acts between enemies and "consequences of hostilities" does not mean a consequence of a war going on. The question therefore turns on the meaning of "warlike operations." The appellants must satisfactorily answer two questions: 1. Was there a warlike operation at the time of the loss? 2. Was the loss a consequence of any warlike operation? It is said that the issue of the Admiralty instructions is a warlike operation. That is a fantastic contention. The issuing of an order is not an operation at all, though it may result in an operation. The object and purpose of the order was to give in time of war an additional source of peace and tranquillity to peaceful operations. It is a shield to keep merchantmen away from hostilities. The effect no doubt was to increase the quantum of the risk of collision but it did not alter the nature of the risk. *Becker, Gray & Co.* v. *London Assurance Corporation* (1) shows the distinction between a loss caused by a measure taken to avoid a peril and a loss caused by the peril itself. An operation to avoid war is not a warlike operation. This is the same case as the *Ionides Case.* (2) To sum up: 1. Sailing without lights, merely by way of precaution to avoid a possible, not a proximate danger, is not a warlike operation. 2. Collision is none the less a sea risk because the risk is increased by the absence of lights.

(1) [1918] A. C. 101. (2) 14 C. B. (N. S.) 259.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

3. If sailing without lights is a warlike operation practically all ships during the war at night were engaged in warlike operations. The appellants fail because they cannot show any warlike operation of which this loss could be the consequence.

[They also referred to *Winspear* v. *Accident Insurance Co.* (1); *Lawrence* v. *Accidental Insurance Co.* (2); and *France, Fenwick & Co.* v. *North of England Protecting Association.* (3)]

MacKinnon K.C. replied.

The House took time for consideration.

THE MATIANA CASE.

The following statement of facts is taken from the opinion of Viscount Cave.

"This vessel was insured with underwriters against the usual marine perils including perils of the sea, the policy containing the usual f.c. and s. clause which, so far as material, was in the following terms: 'Warranted free from capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat, and also from all consequences of hostilities and warlike operations whether before or after declaration of war.' She was also insured with the Liverpool and London War Risks Insurance Association, against war risks, the material clause in this policy insuring the vessel against 'the risks of capture, seizure and detainment by the King's enemies and the consequences thereof or any attempt thereat and all consequences of hostilities and warlike operations by or against the King's enemies whether before or after declaration of war.' On April 24, 1918, the *Matiana* left Alexandria for a British port with a cargo of cotton. At that time sailing under convoy was compulsory, and the *Matiana* with three other merchant ships sailed under convoy with an escort of four of His Majesty's ships. By s. 46 of the Naval Prize Act of 1864 and s. 31 of the Naval Discipline Act, 1866, the master

(1) (1880) 6 Q. B. D. 42. (2) (1881) 7 Q. B. D. 216.
(3) [1917] 2 K. B. 522.

of a vessel sailing under convoy is bound under a penalty to obey the orders of the officer commanding the escort in all matters relating to the navigation of his ship, and those orders may be enforced (if need be) by force of arms. On May 1 the convoy was traversing a part of the Mediterranean between Sardinia and Cape Bon which was usually infested with submarines, and was steering a course more northerly than that which is usually adopted in time of peace. Just before dark, the convoy then sailing N. 30 W., the senior naval officer in command of the escort gave orders that on a given signal the course should be changed to N. 81 W. This signal was given at 9.3 P.M., and the course was changed accordingly. At 10 P.M. the order was given to zigzag. The merchant vessels were proceeding in line abreast, the escorting ships being round about the convoy. At about 12.15 A.M., the *Matiana*, which was the second ship from the left, struck a small reef called the Keith Reef, which is unlighted. The night was calm, and no breakers were seen before she struck. Some eleven hours later she was torpedoed, but it has been found that the ship was lost as a consequence of the stranding and that the fact of her being torpedoed made no difference in this respect. The reef is shown on the Admiralty chart with the words 'generally breaks'; and on the large-scale chart there is a note that 'as the currents are uncertain both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth.' The master of the *Matiana* gave evidence that at the time of stranding he believed that his vessel was some nine miles to the south of the Keith Reef. The naval officer in command of the escort was not called to give evidence. An action was brought by the owners against the Liverpool and London War Risks Insurance Association, and alternatively against the marine risk underwriters, to recover the loss. Bailhache J. found that no negligence was proved either on the part of the master of the *Matiana* or on that of the King's officer; and being of opinion that sailing under convoy was a warlike operation and that the loss was directly due to that operation, he gave judgment against the War

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Risks Insurance Association. (1) On appeal, the Court of Appeal reversed this decision and gave judgment for the war risk underwriters and against the marine risk underwriters. (2) The marine risk underwriters appealed to this House; and thereupon the owners gave a counter-notice of appeal claiming that if the marine underwriters were not liable for the loss the war risk underwriters were so liable, and these two appeals have been consolidated."

1920. May 7, 10, 11, 13, 14. *R. A. Wright K.C.* (with him *Claughton Scott*) for the appellants in the first appeal, Green and others. Sailing in convoy in the circumstances of the case was part of the belligerent measures of the country and constituted a warlike operation; and the stranding and loss of the ship were the direct consequence of warlike operations and were therefore excepted from the marine policy by the f.c. and s. clause. The *Matiana* was subject to the operation just as much as if the senior naval officer had himself gone on board and steered her. He fixed the route; he definitely directed the course—a course which no master in peace time would have dreamt of taking. By the Naval Discipline Act, 1866, s. 31, the master was absolutely bound to obey the directions of the naval officer in command of the convoy in all matters relating to the navigation of the convoy.

MacKinnon K.C. (with him *Lewis Noad*) for the British India Steam Navigation Co., Ld., the respondents in the first appeal and the appellants in the second appeal, referred to *France, Fenwick & Co.* v. *Merchants' Marine Insurance Co.* (3) as to the meaning of "consequences."

Norman Raeburn K.C. (*Butler Aspinall K.C.* with him) for the respondents in the second appeal, the Liverpool and London War Risks Insurance Association, Ld. There is no real distinction between sailing without lights and sailing under convoy. Each is a measure taken to shield a peaceful operation. The two material questions are: 1. Was there

(1) [1919] 1 K. B. 632. (2) [1919] 2 K. B. 670.
(3) (1914) 30 Times L. R. 609.

a warlike operation on the part of the *Matiana*? 2. Did that warlike operation cause the loss? The first question must be answered in the negative and therefore the second question does not arise. The proximate cause of the loss was the marine peril of stranding.

R. A. Wright K.C. replied.

The House took time for consideration.

1920. July 12. VISCOUNT CAVE. My Lords, these appeals raise the same question—namely, whether the loss of a ship, in the one case by collision, in the other by stranding, was a consequence of hostilities or warlike operations, or was the result of a marine risk not falling within that description. The facts of the two cases differ, but as they must be decided on the same general principles, they have conveniently been heard together. The appeal in the *Britain Steamship Co.* v. *The King* arises out of the loss on May 16, 1918, of a British merchant vessel, the steamship *Petersham*. [His Lordship stated the facts.] My Lords, the *Petersham* was lost by collision, and any liability on the part of the Admiralty is therefore expressly excluded by clause 18 of the charterparty, unless the collision was a "consequence of hostilities or warlike operations" within the meaning of clause 19 of the same document. In order to establish the latter proposition, it is necessary to show, first, that there were hostilities or warlike operations which could have caused the collision; and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations. The rule, long established in cases relating to marine insurance and embodied in s. 55, sub-sec. 2, of the Marine Insurance Act, 1906, that an insurer is not liable for any loss which is not proximately caused by a peril insured against, applies with full force to a clause such as that which is now under consideration: see per Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (1) and per Lord Halsbury in *Andersen* v. *Marten*. (2) It appears to me that in the case

(1) 14 C. B. (N. S.) 259, 289. (2) [1908] A. C. 334, 339.

H. L. (E.) 1920 BRITAIN STEAMSHIP CO. v. THE KING. GREEN v. BRITISH INDIA STEAM NAVIGATION CO. BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION. Viscount Cave.

of the *Petersham* the appellants fail to show that there were in fact any hostilities or warlike operations to which the loss of the vessel can be attributed. The word "hostilities" connotes operations of war, which may be either offensive or defensive and may be undertaken either by the vessel immediately concerned or by an enemy or friendly force. The expression "warlike operations" is said to have been added in order to cover cases where similar acts were done but no actual outbreak of war had occurred. But however that may be, the effect of the addition is somewhat to extend the category of acts referred to, even where a war is in progress; and the appellants throughout their argument relied upon the expression "warlike operations" as the wider of the two expressions. But, in order that the words may apply, there must be some act of war or of a warlike character which could have caused the loss sued upon. Here there was no such thing. So far as is known, there was no enemy ship anywhere in the neighbourhood; and the mere fact that a submarine war was being waged by Germany cannot possibly be regarded as a proximate cause of the collision of these two vessels. No friendly warship was near. Both the *Petersham* and the *Serra* were proceeding upon a peaceful mission, and their desire was not to engage in but by all means to avoid warlike operations. It was suggested that sailing without lights in time of war was itself a warlike operation, but that contention appears to me incapable of being sustained. The lights were extinguished in order to avoid the enemy, and there is a well-established difference between a peril insured against and an action taken for fear of such a peril: see *Becker, Gray & Co.* v. *London Assurance Corporation.* (1) Nor can the Admiralty regulation, which was of general application, be said to be an operation of any kind. No doubt the risk of collision was greater by reason of the absence of lights, but it remained a sea risk though increased by war conditions. The case of the *British and Foreign Steamship Co.* v. *The King* (2) was relied upon. But that case is clearly distinguishable, as it was there admitted on behalf of

(1) [1918] A. C. 101. (2) [1917] 2 K. B. 769; [1918] 2 K. B. 879.

the Crown that sailing without lights at night was a warlike operation, and the decision proceeded upon that footing. No doubt the admission could readily be made in that case, as both the vessels concerned, the *St. Oswald* and the French battleship *Suffren*, were proceeding to evacuate troops from Cape Helles, and were therefore very plainly engaged in warlike operations. But the admission can have no effect in other cases. The decision of the Court of Appeal in *Inui Gomei Kaisha* v. *Attolico* (1) turned, not on the absence of lights, but on negligence. In the case of *The Petersham*, therefore, I am clearly of opinion that the decision appealed from is right and that the appeal should be dismissed with costs.

The second appeal, *Green* v. *British India Steam Navigation Co., Ld.*, and the supplemental appeal arise out of the loss on May 1, 1918, of a British merchant vessel, the steamship *Matiana*, which was the property of the British India Steam Navigation Co. [His Lordship stated the facts.] There is no doubt that the owners are entitled to be compensated by one set of underwriters or the other, and the only question is on which side the liability falls.

My Lords, in order to determine this question it is first necessary to inquire (as in the former case) whether there were any hostilities or warlike operations which could have caused the loss. I think there were. No enemy craft is known to have been in the neighbourhood at the time of the stranding, and the loss cannot be attributed to hostilities on the part of the enemy. Nor, in my opinion, is it correct to say that the *Matiana* was herself engaged in any warlike operation. It is true that she was being convoyed by warships ;. but that was done for her protection against possible attack, and she herself formed no part of any attacking or defending force. In this respect I agree with Atkin L.J. who says : "It appears to me fallacious to identify the merchant vessels sailing with convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy.

(1) Lloyd's List, July 20, 1918.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Viscount Cave.

The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding." But in my opinion the British warships which formed the escort of the convoy were engaged in a warlike operation. It has been said that almost any movement of a warship of a belligerent Power by sea in time of war is a warlike operation; and that term would certainly appear to cover an expedition undertaken by vessels of war in wartime for the protection of merchantmen against the enemy.

But, assuming this to be the case, there remains the crucial question, whether the operation of the convoying vessels was the proximate or direct cause of the loss of the *Matiana*. I think it was. The inference which I draw from the facts above stated is that the loss was the direct consequence of the orders given by the naval officer in command to take the course which he prescribed. No doubt the existence of the reef and its surrounding currents was a condition without which the vessel would not have stranded; but the true cause of the stranding was the act or event which brought the vessel within their dangerous influence. If she had been driven upon them by a storm or by hostile pursuit, or had been brought there by the negligence of those on board, the loss would have been properly described as caused, not by the reef or its currents, but by the storm or by the enemy or by bad seamanship, as the case might be. In fact she was compelled to enter the area of danger by the orders of the officer commanding the escort, which she had neither the right nor the power to disobey; and I think the true conclusion is that those orders were the direct and determining cause of her loss. It is contended that, even if this be so, it does not follow that the loss was a consequence of warlike operations, as the giving of an order cannot in itself be an operation. Perhaps it cannot, if the order stands alone. But in the present case the orders were a part of the convoying operation which included the choice of the route, the setting of the course,

and the precautions taken on the voyage; and I do not think that the transaction can be split up and treated as in part an operation and in part something other than an operation. It was the duty of the commanding officer, for the protection both of the warships under his command and of the merchant vessels under his care, to direct the course of the convoy as he thought best; and in doing so he was but carrying out the operation with which he was charged. In my opinion, therefore, the loss was a consequence of warlike operations within the meaning of the war risk policy.

The Court of Appeal came to a different conclusion, and it remains to consider the reasons upon which their decision was founded. The judgment of Warrington L.J. was mainly based on the view that neither the escorting nor the escorted vessels were engaged in a warlike operation; and I have already given my reasons for holding that the escorting vessels were so engaged. But the learned Lord Justice added: "Assuming that the order of the commander was a part of the operation I do not think it was proved in this case that the loss was directly caused by that or by the master's obedience to it. The plaintiffs in fact leave it in doubt whether the stranding was inevitable if the order was obeyed or whether there was some other cause such as the effect of currents which brought it about." Duke L.J. did not deal expressly with this point, but Atkin L.J. expressed his view as follows: "The actual loss was caused by an ordinary sea peril—stranding. It seems to me impossible to say that the naval officer directed her on to the reef; or that her striking was the inevitable or even the probable, consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging an unknown or uncharted route. No doubt by taking the course she was ordered, she was exposed to the risk of striking the reef; but in my view the true result of the order was merely to expose the ship to a greater chance of suffering a loss from marine peril."

H. L. (E.)
1920
BRITAIN STEAMSHIP CO. v. THE KING.
GREEN v. BRITISH INDIA STEAM NAVIGATION CO.
BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.
Viscount Cave.

I feel the force of this reasoning, but with great respect to the learned Lords Justices, I think it gives too little weight to the special facts of this case. No doubt the loss was actually caused by stranding, but it is necessary to look beyond that fact and see what caused the vessel to strand. The route taken in this case was neither unknown nor uncharted. The position of the reef and the dangerous nature of the currents surrounding it appeared upon the chart and were known to every one; and but for the orders of the naval officer, the *Matiana* would not have found herself anywhere near them. The naval officer was not called, and we do not know why he gave the order to turn at the moment when it was given. He may have been out of his reckoning at the moment, or he may have under-estimated the effect of the tide or the currents on vessels pursuing a zigzag course. He may even (as Bailhache J. suggests) have run the risk of the rocks to avoid some submarine danger known to or suspected by him. But in any case he set the course which took the *Matiana* into the area of danger. Having entered that area, she could not by any exercise of seamanship on the part of her officers have avoided the rock, which was submerged and invisible. Her striking was not a mischance due to the ordinary perils of the sea. It may not have been the inevitable, but it was the not improbable, consequence of the order given by the naval officer, and was its actual result. If I may borrow the apt illustration used by Atkin L.J. in a passage which I have already cited from his judgment, I should say that, if a shepherd in order to avoid the wolf were to drive his sheep along a path leading to a precipice down which they fell, the loss of the flock would be a direct consequence of his pastoral operations. Here the escort (either by reason of some error or for some other cause) shepherded the *Matiana* into a course which led to the reef, and her stranding was the result. The authorities, so far as they go, support the above conclusion. In *Ard Coasters, Ld.* v. *The King* (1) a trading vessel was accidentally run down by a British destroyer engaged in patrolling for submarines, and in *S.S. Richard de Larrinaga* v. *Admiralty*

(1) 35 Times L. R. 604; 36 Times L. R. 555.

Commissioners (1) a vessel was lost by collision with a warship which was on her way to take up a convoy. In each case it was held by the Court of Appeal that the loss was the direct consequence of a warlike operation. Of course, those cases are distinguishable from the present, as in each of them the warship came into actual collision with the vessel which was lost; but they are useful as showing that a warship may be engaged in a warlike operation though no attack upon or by the enemy is impending or immediately apprehended, and also that an accident which is not the inevitable or calculable result of the course taken by a warship may yet be the direct consequence of her action.

Upon the whole, I have come to the conclusion that the loss of the *Matiana* was a "consequence of hostilities or warlike operations"; and accordingly that the war risk underwriters are liable; and I would set aside the order of the Court of Appeal in this case and restore that of Bailhache J. with costs here and below.

LORD ATKINSON. My Lords, it has long been firmly established as a rigid principle of the law of marine insurance, to be unfailingly applied, that in order to recover on a policy damages for the loss of a ship by one of the perils insured against that peril must be proved to have been the direct and proximate cause of the loss. The *Petersham* a cargo-carrying ship was lost on May 6, 1918, in consequence of a collision with another ship, the Spanish steamship *Serra*.

Collision at sea is prima facie a sea risk. The burden of rebutting that presumption rests in this case upon the suppliants. Whatever be the true meaning of the words "hostilities" and "warlike operations" as used in clause 19 of the charterparty, known as T. 99, under which the *Petersham* was chartered, the suppliants can, on the facts proved, only recover the damages sued for by establishing affirmatively that this collision was not a sea peril, but was the direct and proximate consequence of an act of "hostility" or of

(1) [1920] 1 K. B. 700; [1920] 3 K. B. 65.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING. GREEN v. BRITISH INDIA STEAM NAVIGATION CO. BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Atkinson.

a "warlike operation," or in other words that an act of "hostility" or a "warlike operation" was the direct and proximate cause of the loss. I concur with Atkin L.J. in thinking that the word "hostilities" connotes the idea of belligerents, properly so called, enemy nations at war with one another, and is used to describe the operations, offensive, defensive, or, possibly, protective of the one against the other, in the conduct of their war. I also concur with him in thinking that the words "warlike operations" have a much wider reach, and not only include "hostilities," but cover, even where a state of war does not exist, operations of such a general kind or character as belligerents have recourse to in war, as for instance where combative operations are undertaken to suppress a rebellion against an allied or friendly power, or where the territory of a nation has "before war has been declared" required, in anticipation of attack, to be protected by such defensive measures as laying down mines. The transfer of the combative forces of a power from one area of war to another, or from one part of an area of war to another part, for combative purposes, would, I think, be a "warlike operation" within the meaning of this charterparty, as would also be the patrolling by the ships of war belonging to a nation of the sea coast of that nation, or of an allied nation, for the purpose of preventing invasion, or even for the purpose of protecting from hostile attack by enemy vessels the lives and property of the inhabitants of its seaboard towns. If in the course of this patrolling a ship of war collided with and sank a merchant vessel the loss would, of course, be a direct consequence of a "warlike operation." If, however, the inhabitants of such a town, in order to prevent its being made a target for the fire of an enemy's vessels of war, chose voluntarily, or upon compulsion, to screen all their lights and bury their town in almost complete darkness, this wise measure of precaution could not, I think, with reason, be described as a "warlike operation," though it might incidentally vastly increase the dangers attending locomotion in the streets and thoroughfares of the town. And just as I am of opinion that patrolling, such as I have mentioned,

would be a "warlike operation," so also am I of opinion, for the reasons I shall presently give more fully, that the shepherding, directing and protecting from possible attack by ships of war of convoyed merchantmen are on the part of those ships of war, though not on the part of the merchantmen convoyed, "warlike operations." Of course if a merchantman chose to take combative action, such as attempting to ram an enemy submarine, that action would, while it lasted, be a "warlike operation." The sailing over the sea by a cargo-carrying ship from port to port is in its nature a peaceful adventure, whether undertaken by day or night, in war time or in time of peace. But the dangers which in war time beset such an adventure, especially the danger of attack by enemy submarine, may not only justify, but absolutely require that certain conditions should, as precautions against possible hostile attack, be imposed upon these merchantmen as to the mode and manner in which they shall carry out their adventures. One of these conditions is, that when sailing at night they shall not exhibit their regulation lights. It is a purely negative thing, not in any way combative or aggressive in character. The non-exhibition of those lights during darkness, no doubt, necessarily increases considerably the risks of collision, since those who navigate such ships may, by reason of it, be rendered unable to see an approaching ship in time to manœuvre so as to keep clear of her, but as a recompense it is designed and presumably calculated to protect her to a considerable degree from submarine attack. The lights both of the *Petersham* and of the Spanish ship were concealed when they collided. The collision no doubt was brought about by that concealment; neither ship has been found guilty of negligence. I do not think, however, that a voyage such as that upon which each of these ships was engaged, a voyage which in time of peace would be treated as an ordinary maritime adventure, becomes either a "hostility" or a "warlike operation," within the meaning of this charterparty, merely because of the fact that, as a precaution against possible attack, she is compelled not to exhibit her regulation lights during the night, even though the

H. L. (E.) 1920 BRITAIN STEAMSHIP CO. v. THE KING. GREEN v. BRITISH INDIA STEAM NAVIGATION CO. BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION. Lord Atkinson.

consequences indicated should follow from this concealment. Mr. Wright on behalf of the suppliants contended (1.) that the making by the Admiralty of an order that vessels should, when voyaging, not exhibit their "regulation lights" was in itself a "warlike operation," and (2.) that even if not, obedience to such an order, if rendered, was a "warlike operation." Such orders are no doubt made during war for the purpose mentioned; but neither the making of them nor the obedience to them is, in my view, a "warlike operation" within the meaning of the charterparty. The case of the *British and Foreign Steamship Co.* v. *The King* (1), referred to in argument as the *St. Oswald's Case*, is in all essentials fundamentally distinguishable from the *Petersham Case*. In that case the vessel which was lost was requisitioned by the Admiralty and bound to obey the orders given through its accredited officers. She was, at the time of her loss, employed in obedience to these orders on a service which was in its own nature a "warlike operation"—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship, the *Suffren*, she had not got these troops on board, but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. This circumstance does not, in my view, alter the character of the operation she was at the time of collision performing. Again, the *St. Oswald* was sunk in an area of naval warfare by an allied warship presumably engaged at the very time in carrying out "warlike operations." From whatever point of view the disaster be regarded, it was, I think, the direct and proximate consequence of a "warlike operation." The decision in it has no application to the case of *The Petersham*. In the latter case the appeal, I think, fails and should be dismissed with costs.

The case of *The Matiana* is one of an entirely different character from both these cases. It presents much greater difficulties. These difficulties are somewhat increased by the

(1) [1918] 2 K. B. 879.

fact that the senior naval officer who commanded the ships of war convoying the four merchantmen, of which the *Matiana* was one, and gave the orders as to the courses the latter should follow, was not examined as a witness. The war risk policy dated March 13, 1918, effected on the *Matiana* with the Liverpool and London War Risk Association, Ld., contained the following clause No. 9: "The said ships shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyd's policy with collision clause attached and containing an f.c. and s. clause in the following terms: 'Warranted free from capture, seizure and detention and the consequences thereof, or any attempt thereat, barratry, piracy, riots and civil commotion excepted, *and* also from all consequences of *hostilities or warlike operations* whether *before or after declaration of war.*'" Shortly after midnight on April 30, 1918, the *Matiana* ran upon the Keith Rocks on which there were no lights, and the night being calm there were no breakers which might have been observed by those on board the vessel as she approached these rocks. She was next day at about 11.30 struck by a torpedo, but Bailhache J., sitting in the Commercial Court, before whom the case first came, held that the position of the *Matiana* was hopeless from the first, and that even if she had not been torpedoed she would have become a total wreck. This finding of fact has not been appealed against. He also found that the master of the *Matiana* was in no way to blame for the position in which he found himself, and that no negligence was proved against the naval officer in charge of the convoy. The question for decision upon this appeal then is whether on the facts proved the loss of this vessel was due to a marine risk or to a war risk, and this, in the result, admittedly depends upon whether a "warlike operation" was or was not the direct and proximate cause of her loss. Bailhache J. found that the loss was due to a war risk and gave judgment accordingly against the Liverpool and London War Risks Insurance Association, Ld., the underwriters under the war risks policy already mentioned, and in favour of the underwriters under a marine risk policy.

H. L. (E.)
1920
BRITAIN STEAMSHIP CO. v. THE KING.
GREEN v. BRITISH INDIA STEAM NAVIGATION CO.
BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.
Lord Atkinson.

From the report of the case before Bailhache J. (1) he seems to have based his decision on the view that to sail with a convoy is in itself a warlike operation, not only on the part of the ships of war which compose the convoy, but also on the part of the merchant ships convoyed, and that no negligence contributing to the disaster having been proved either against the master and crew of the *Matiana* or those of any of the ships of war, the loss of the *Matiana* was a war risk. He states his view clearly in the following passage of his judgment: "To sail with convoy is, in my opinion, a warlike operation. The assembling of the ships to be convoyed, and of the men-of-war to convoy them, the voyage of the whole flotilla, the route chosen and the precautionary measures taken on the voyage must be taken together as all part of a warlike operation. In this case the vessels pursued a zigzag course, and were sailing at the time through a submarine-infested area, and some 30 miles to the morthward of the ordinary peace time course. The stranding happened in the course of this warlike operation, and, subject to another point made by the war risk underwriters, was directly due to it." With all respect, I am quite unable to concur in the learned judge's view that the merchant ships convoyed, whose task was simply to sail peacefully on the course they might be directed to follow, and to keep their proper places in the convoy, became so identified with the ships of war directing and protecting them, as to be treated as members of a joint flotilla engaged in a common enterprise. I concur with Atkin L.J. in thinking that the learned judge treats as he said the sheep and the shepherd as both engaged in the operation of shepherding. The duties and proper tasks of convoying warships and the ships they convoy are respectively indicated in ss. 30 and 31 of the Naval Discipline Act of 1866 (29 & 30 Vict. c. 109). The naval officers are to diligently perform the duties of convoying and protecting the ships they are appointed to convoy according to instructions, to defend these ships and the goods they carry without deviation, to fight in their defence if they are assailed and not to abandon

(1) [1919] 1 K. B. 632, 636.

them or expose them to hazard. Every master or other officer in command of any merchant or other vessel convoyed is bound to obey the commanding officer of the ships of war in all matters relating to the navigation or security of convoy, and is also bound to take such precautions for avoiding the enemy as may be directed by this commanding officer. It does not appear, however, that this latter officer has any power to require the master, officers or crew of any merchant ship which is being convoyed to take combative action against a vessel of any kind, or to join in such action if taken by all or any of the ships of war. The roles of the two classes of ships are entirely different in nature and character. That of the ships of war is protective and if need be combative; that of the merchantmen is not at all combative; and as far as the circumstances permit is as peaceful in nature and character as would be their enterprises in time of peace.

If this latter be the correct view, as I think it is, then in order that the underwriters of the war risk policy may be made liable, the "warlike operation" which is the proximate cause of the loss of the *Matiana* must have been something which was done by the attendant warships or their officers. The loss of a ship by striking or grounding on rocks is, as I have said, prima facie a marine risk. The burden of proving that it is, in this case, a war risk rests upon the owners of the *Matiana*, or on the underwriters under the marine policy. The question for decision resolves itself I think into this: Has that burden been discharged by the evidence given in the case? Warrington L.J. sums up the evidence with accuracy, and sufficient fulness (1) to enable one to decide that question. He says: "The steamship lost . . . . was homeward bound on a voyage from Egypt with cotton. . . . . The convoy had to traverse a part of the Mediterranean between Sardinia and the Gulf of Tunis, which was infested by enemy submarines. With the object of avoiding an attack the convoy steered a course more northerly than that usually adopted in time of peace. At 9.3 P.M. under order of the senior naval officer the course was changed from N. 30 W. to

(1) [1919] 2 K. B. 670, 680.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Atkinson.

N. 51 W. (sic). (1). The ships had been warned earlier in the evening that this change of course would be made. At about 12.15 A.M. the *Matiana* struck a small reef called the Keith Reef, which is unlighted. . . . . The master believed that his position at 9.3 P.M. was such that a course of N. 51 W. (1) would have taken him some nine miles to the southward of the Keith Reef. The naval officer was not called and nothing therefore is known as to his information at the time he gave the order to turn. The currents in that neighbourhood are very uncertain. The convoy was sailing a zigzag course from 10 P.M. until the accident, but the master says notwithstanding that fact he was keeping a correct mean course of N. 51 W. (1) Either the ship must have been further to the northward at the time of the turn than was supposed or she must have drifted north during the $3\frac{1}{4}$ hours between 9.3 P.M. and 12.15 A.M., but there was no evidence proving how it came about that she struck the reef instead of passing to the southward of it. There was no evidence that the naval officer's order to change the course was given in consequence of information that a submarine was in the neighbourhood, in fact the contrary would appear to be the case, for the change had been arranged some hours before, the moment of the change only being left to be decided." He adds that the course prescribed was ordered "not for the purpose of avoiding or resisting attack by a particular enemy, whose presence was known, but as part of a series of precautionary measures taken for the safety of these merchant ships in waters in which enemy craft might not improbably be encountered." The learned Lord Justice (2) expresses the opinion that there was no "warlike operation" in this case of which it could be said that the loss was the consequence, but later on he says: "I think it is incumbent on those who seek to throw the loss on the war risks underwriters to prove that the loss was the direct consequence of some warlike operation. Assuming that the order of the commander was a part of the operation I do not think it was proved in this case that the loss was directly caused by that or by the master's obedience

(1) This should be N. 81 W. (2) [1919] 2 K. B. 684.

to it. The plaintiffs in fact leave it in doubt whether the stranding was inevitable if the order was obeyed, or whether there was some other cause such as the effect of currents which brought it about." Duke L.J. (1), after assuming that the naval vessels of the convoy were engaged in a warlike operation, says: "I am satisfied that in point of fact the *Matiana* was never ordered to do, never did, and never participated in, any warlike operation or belligerent act. She never lost her character of a merchant ship carrying merchandise." Atkin L.J. (2) says: "It appears to me fallacious to identify the merchant vessels sailing with convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting the non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding. It is true that the merchant ships have to obey the instructions of the commanders of the warships." And he then says: "But the fact that non-combatants are in particular circumstances or in particular areas made subject to the orders of combatant officers conducting warlike operations, does not appear to me sufficient ground for inferring that, while obeying those orders, they are engaged in warlike operations. . . . . I come to the conclusion that the *Matiana* was not engaged herself in a warlike operation. But this is not sufficient in itself to decide the case; for it was urged that at any rate the loss was a consequence of a warlike operation by the commander of the escort in controlling the course of the convoyed ships. I doubt whether the giving of an order in itself can ever be an operation. That which is done under the order constitutes the operation. . . . . But I will assume that in giving the order when he did to take a particular course, the commander was performing a warlike operation; was the loss the consequence of it? . . . . The actual loss was caused by an ordinary sea peril, stranding. It seems to me impossible to say that the naval officer directed her," (the *Matiana*) "on to the reef; or that her striking was the

(1) [1919] 2 K. B. 690. (2) Ibid. 698, 699.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING. GREEN v. BRITISH INDIA STEAM NAVIGATION CO. BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

inevitable or even the probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. . . . . No doubt by taking the course she was ordered, she was exposed to the risk of striking the reef; but in my view the true result of the order was to expose the ship to a greater chance of suffering a loss from marine peril."

I entirely concur in the views thus expressed by Atkin L.J. I think the owners of the *Matiana* and the underwriters of the marine policy have failed to discharge the burden which rested upon them and that in this case, as in that of *The Petersham*, the appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I think both of these cases are accompanied with great difficulty. The refinements of distinction between them and others, and especially between these two themselves, perplex the mind.

In result I have come to be of opinion that the loss of the *Petersham* was proximately caused by a peril of the sea.

It is no doubt true that when she and the *Serra* on the night of the collision were sailing without lights they were doing so in conformity with a general regulation issued by the authorities in consequence of the existence of a state of war. The result of lights being exposed would have been to place valuable British assets at the mercy of the submarines or other armed naval forces of the enemy; and the saving of these assets from falling into enemy hands or from being destroyed by enemy power was an object which, in a general sense, might be subsumed under the term of "defence of the realm." Accordingly during the period of war the authorities charged with the subject, whether naval, military, or civil, were entitled to promote that defence by the issue of regulation and order. I do not see my way, however, to hold that the issue of such orders or regulations converted risk of collision, which under an ordinary policy falls within the category of a sea risk, into an exception from that category. The sailing without lights added to the quantum of that sea risk; it

made the chance of collision greater, but I agree respectfully with the Courts below, and especially with Atkin L.J.'s view upon this point, in thinking that it did not convert the risk into one arising as a consequence of hostilities or warlike operations.

Sects. 18 and 19 of the Time Charterparty T 99, have already been cited. From 18 it is seen that the loss of a steamer in collision is classed alongside of any other cause arising as a sea risk; while 19 enumerates the war risks which are taken by the Admiralty. They mention capture, seizure and detention and the consequences thereof or of any attempt thereat except piracy, and proceed, "and also from all consequences of hostilities or warlike operations whether before or after declaration of war." It appears to me that it would require (a collision of two ships at sea having occurred) something more than a regulation or order for safety on the voyage, something of the nature of an actual and accomplished change of facts, of the nature of an operation conducted in the course of hostilities of war, to lift the event of collision into the category of war risks. I accept accordingly the result reached by the Courts below.

I reach a different result in the case of *The Matiana*. I think that the putting of a vessel under convoy, with all that that involves, is an actual and accomplished change of circumstances and an operation which is conducted in the course of hostilities or war. The loss of the vessel, in my humble opinion, did arise out of "the consequence of hostilities or warlike operations," and the case is therefore free from the scope of a maritime peril and falls within the war risk insured against. It is in this view, my Lords, that I think it necessary to quote the terms of the Naval Discipline Act of 1866 which still bound the merchant shipping of this country during the recent war. Sect. 31 of that Act provides: "Every Master or other Officer in command of any Merchant or other Vessel under the Convoy of any Ship of Her Majesty shall obey the Commanding Officer thereof in all Matters relating to the Navigation or Security of the Convoy, and shall take such Precautions for avoiding the Enemy as may be directed by

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Shaw of Dunfermline.

such Commanding Officer; and if he shall fail to obey such Directions, such Commanding Officer may compel Obedience by Force of Arms, without being liable for any Loss of Life or of Property that may result from his using such Force." It is difficult to figure language which more emphatically puts the naval commander of the convoy in control of the movements of the merchant vessel. To all intents and purposes it is the same as if he had placed on the convoyed ship a naval officer in command as subordinate to himself. In short, so far as the direction of the course of the vessel was concerned, the merchant captain and officers were no longer in control. The naval officers were. Not only so, but the orders of the commander of the convoy were clothed with the instant sanction of force. An order disobeyed might be followed by the guns of the convoy being levelled or fired against the offending vessel, and the officer is secured by statute against liability for any consequent loss of life or property.

I do not doubt that so far as the ships acting as convoy were concerned they were thus conducting a warlike operation. I think the decision in the case of *Ard Coasters Ld.* v. *The King* (1), to the effect that a warship patrolling in the course of her duty and thereby causing a collision with a merchant vessel, was a right decision. Suppose, in the present case one of the ships acting as convoy had run down one of the ships convoyed, I can hardly doubt that that event would have been similarly found. The case accordingly is narrowed to the distinction between ships which are acting as convoy and ships which are themselves under convoy. I myself see great force in the view which Bailhache J. so clearly expresses to the effect that all the vessels—those acting as convoy and those under convoy—must be treated as a unity. He concludes accordingly that they were all engaged in warlike operations. I respectfully agree with that learned judge.

My Lords, it is not necessary, in my opinion, and I say this having fully in view repeated expressions of opinion in this case in the Courts below, to postulate that the vessel to which

(1) 35 Times L. R. 604; 36 Times L. R. 555.

the accident or calamity occurred was itself actually and individually engaged in hostilities or warlike operations. The policy does not say so. What it says is that the thing which is insured against is "the consequences of hostilities or warlike operations," but it does not say "the consequences of hostilities or warlike operations in which the vessel itself is engaged." I am humbly of opinion that, so far as ships under convoy are concerned, all these ships are, along with the ships acting as convoy, under a unified command, and that command issuing from the commander of the convoy is, as part of the direction of the convoy, a military operation. The consequence of it upon those merchant vessels to whom the command was issued was to place them compulsorily in a situation of peril in which unquestionably they would not have been placed but for the course thus forced upon them. These vessels might, of course, be said not in themselves to have been engaged in either hostilities or warlike operations; but that they suffered this peril, and in the case of the *Matiana*, this loss, as a consequence of warlike operations, seems to my mind clear.

The first broad fact of this case is that if the *Matiana* had not been under convoy she would not have been in that part of the sea, where the peril of currents driving her on the rocks occurred. The vessel was stranded on Keith Reef, north-east of Biserta to the north of the Gulf of Tunis. There is no disputing the case that at this time the Mediterranean was the scene of very frequent submarine sinkings amounting to so many as five per day, and that there were "notorious tracts specially bad." Describing this "dangerous neighbourhood" in which was the Keith Reef, Captain Lane mentions the Riddlecombe Patch, the Hecate Patch, the Locust Patch, and Skerki Bank, and tells how in the ordinary course of navigation one would keep well clear of such a neighbourhood. In these circumstances, the naval authorities, acting no doubt to the best of their wisdom in trying circumstances, put the *Matiana* and three other vessels under convoy, and the course of the convoy was steered into this unquestionably dangerous zone. A note on the chart is quoted by the witness

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Shaw of Dunfermline.

mentioned to the following effect: "As the currents are uncertain both in strength and direction, and the reef not always visible, care should be taken to give all these dangers a wide berth." The evidence is quite clear that this was the rule of navigation with regard to that locality. In the ordinary course of navigation, merchant vessels will keep well clear of it, the witness saying: "We should not go anywhere near it, not in peace time.' However, the captain says: "All the courses that I took were from the Senior Naval Officer. He was the man who gave all the orders." Being questioned: "You were then, I take it, entirely under the direction of the Senior Naval Officer? You could not yourself fix your vessel?" He answers: "No. He told us when he blew the whistle and gave the signal to alter our course. It was too dark to take stars or anything like that."

It is admitted that the vessel was exactly thus in the convoy when it—one of the four vessels convoyed—struck the reef. Be it that the ship was about nine miles to the southward of what was expected; it was in waters where the currents were so strong that a mistake of that kind was not unnatural, and against it the officers and crew of the *Matiana*, obeying naval orders, were helpless. Proper or ordinary navigation free from convoy would never have placed them or the ship within this danger zone.

My Lords, I ask myself the question, what difference in principle it would have made if, instead of the senior naval officer directing the course of the *Matiana*, that commander had put the *Matiana* in tow by a hawser from the stern of the *Clematis* and guided her not only into the dangerous reach of the current, but towed her, unknowingly and in the dark, on to the rocks. I could not have seen my way to hold that the stranding did not then occur in consequence of a warlike operation; and I think that the same reasoning must be applied to the present case. The refinement is too great for me to appreciate it which would distinguish the loss of a vessel acting as convoy from the loss of a vessel, either physically convoyed as I have suggested by hawser or convoyed in her course by compulsory compliance with orders

therefrom, taking and keeping her place and distance relative to the other ships of the expedition and according to the prescribed points of the compass.

On these grounds I am of opinion that the loss of the *Matiana* was an event which, in the language of the policy, arose from one of the consequences of hostilities or warlike operations. In my view, the judgment of Bailhache J. was correct and should be restored.

LORD SUMNER. My Lords, in the first of these two cases, that of *The Petersham*, the suppliants claim on a ship's time charter in form T. 99. In the second case, that of *The Matiana*, the action is brought on a policy of insurance against all perils excluded from an ordinary Lloyd's policy by the f.c. and s. clause set out. The *Matiana* was insured at Lloyd's and her owners sued alternatively on the Lloyd's policy. Thus the owners of the *Matiana* recover on one policy or the other, and the dispute is between two sets of underwriters; in the case of *The Petersham*, the owners bear the burden of failure themselves. It was not disputed that the claim on the charterparty was to be treated as a claim on a policy of insurance, nor were the differences in the wording of the clauses in the two cases alleged to establish any substantial difference between them for present purposes. In effect, the claim in each case is for a loss proximately caused by consequences of warlike operations. One ship was sunk in collision, the other stranded and never got afloat again. The risks excepted by the f.c. and s. clauses employed are, among others, risk of such collisions and strandings (which, in themselves, are losses by perils of the seas) as may be proximately caused by hostilities or warlike operations or their consequences. In each case therefore two questions arise: (*a*) was the collision or stranding caused by any act or consequence of hostilities or by any warlike operations or consequence thereof, and if so what? (*b*) Was it proximately so caused?

I will take the *Petersham* first. She was steaming at night without showing her lights and met the *Serra*, which was doing

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.

GREEN v. BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Sumner.

likewise. Each failed to make the other out till it was too late. Each was peacefully sailing the seas on her lawful occasions, and the *Serra* was actually a neutral, bound not to engage in any warlike operation. In showing no lights each was only doing what all ships did a few generations ago and what some ships did quite recently in unfrequented waters to save a little oil. Sailing the seas even under conditions of modern maritime warfare is not in itself the same thing as traversing a battlefield on land, though even that may be done on a peaceful errand. To go ahead in the dark may be foolish or wise but it is not warlike, nor is it made warlike because what would otherwise be blameworthy is done in obedience to lawful commands. No doubt the object is to avoid being seen if the enemy is present, but if no enemy is present the act is a precaution only, which fortunately is not needed. The operation of the *Petersham* and the operation of the *Serra* were in each case peaceable ; neither was doing anything warlike separately, nor were they doing anything warlike together. Nor again was the operation of those who issued the order warlike, though it was performed in time of war. It did not become a warlike operation merely because its object was to baulk warlike operations on the part of the enemy. I say nothing of hostilities, because of actual hostilities there was no evidence at all. Whatever may have been the case in *British and Foreign Steamship Co.* v. *The King* (1), which turned on an admission by the Crown, I think that, in the circumstances of the *Petersham's* case, sailing without lights was neither a warlike operation nor was it the consequence of one. The fact is that each of these ships was making a peaceable voyage under wartime conditions and no more. Historically it was due to the enemy's submarine campaign, but not as its proximate consequence.

As for the *Matiana*, she was sailing with convoy. She was bound to take her course from the senior officer of the convoy and did so, and, thanks to the set of a variable current, she came unexpectedly on to the Keith Reef. Her operation also was proceeding on her trading voyage. It is true she did so

(1) [1917] 2 K. B. 769 ; [1918] 2 K. B. 879.

by an unusual route but the deviation was justifiable and obligatory. She found in her way a rock, submerged and unlighted, which, in itself, was a marine peril. It was a moonlight night and, if there had been any wind, she would probably have seen the break of the sea on the reef in time. As it was a still night she had no warning and she stranded. Why is such a stranding a consequence of warlike operations? The *Matiana* had to do as she was told, but she was not told to go aground either directly or indirectly. I think that the case of *The Matiana* can only be distinguished from that of *The Petersham* by dwelling on the facts, first, that she was in convoy and, second, that, in addition to general orders as to not exhibiting lights, she was under particular orders as to the course to be shaped and the stations to be kept. In brief, sailing with convoy is only sailing in company and is no more a warlike operation than sailing alone. If, for the sake of protection in case of danger, the *Matiana* had kept as close as she could to a King's ship casually encountered, she would still have been peacefully occupied. What difference is made by additional orders given ad hoc by the senior naval officer? It is suggested that the case is the same as if he had been on her bridge, had himself laid and directed her course and had her steered straight on to the reef. Even if it were so, I am by no means prepared to say that this would have sufficed. Not everything done by a King's ship, or a King's officer, in time of war is necessarily a warlike operation or the consequence thereof. I refrain from discussing the particular cases cited of damage done directly by men of war, lest any case decided on their authority may be under appeal to your Lordships' House and might seem to be prejudiced by anything said now. Collision between the *Matiana* and a man-of-war would have raised considerations, which, whatever their value, do not arise on this appeal, but I think the sufficient answer to the above contention is that the case is not that of a King's officer being on the *Matiana's* bridge in responsible charge of the helm. It is not a case of deliberately running her aground for some purpose of war. Her course and station having been prescribed some hours before, she was in her own officers'

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.
GREEN v. BRITISH INDIA STEAM NAVIGATION CO.
BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Sumner.

charge, and there is no evidence to show or to suggest that the avoidance of a local obstacle in her track was not left to them, or that her orders were to keep her course, let the consequence be what it might. There is nothing to suggest that, if the rock had been visible, she was not entitled and bound to manœuvre so as to avoid it. Her officers were not to blame, for they could not see it, but her inability to see the rock seems to me to be indistinguishable from the *Petersham's* inability to see the *Serra*; there was nothing warlike about it—the peril of it was of the seas. For the rest, an order given by an officer in company and in authority referring to a compass course does not really differ from an order given generally in Admiralty Regulations; it is a special order but it is an order to do or to refrain, like the general order as to lights. Warlike operations and hostilities generally prevailing supplied the reason for it, but even if it was a consequence of an operation of war the stranding was not its proximate consequence.

The case of *Ionides* v. *Universal Marine Insurance Co.* (1) was relied on in this connection. It was argued, as I understood, that the illustrations given by Erle C.J., were in point as showing that importance attaches to the presence or absence of negligence in the navigation of the vessel lost. Collation of the different reports, especially of that of the Law Journal with that in the Common Bench Reports, satisfies me that the allusion to negligence in the illustration of an escaping ship, which takes a free channel but negligently runs aground, really meant that the channel was truly free, for escape by it was possible. This was proved by the fact that a better seaman would have made his escape by it. Hence the loss of the ship by stranding in the supposed case was not a loss by an attempt at capture, from which, try as he would, the captain had no escape. It was a loss by stranding, due to the helm action taken and the course laid, when the captain might have done otherwise, and the attempt at capture was a remote cause only. The fugitive ship, so far from being a lost ship from the beginning, as in the illustration of a ship hopelessly embayed or a ship deliberately stranded, was

(1) 14 C. B. (N. S.) 259.

really a ship, which could have escaped, just as in the illustration where the embayed ship escapes, thanks to a shift of the wind. To say that in Erle C.J.'s illustration the captain's negligence showed that the ship was not stranded proximately by the attempted capture is no warrant for arguing that a ship must be held to be lost proximately by warlike operations, because she was put on the reef by misfortune and not by negligence. It is in this sense that I understand the observations about the trading ship's negligence in *The Larchgrove* (1) and *The Ardgantock* (2) by Roche J. and Bailhache J. respectively.

The remaining argument is that at any rate each loss is "attributable" to warlike operations and hence fully within the clause, and the analogy of a loss by perils of the sea which is held to be irrecoverable when it is attributable to the assured's own wilful act, was put forward. If that means that a loss, not proximately caused by warlike operations but (remotely) attributable to them, is one for which the insurers are liable, in a case like the present, it is contrary to s. 55, sub-s. 1, of the Marine Insurance Act, 1906, for the policy contains no special provision to this effect, unless the words "consequences of warlike operations" are pressed beyond anything that they will bear. It is stated in *Ionides* v. *Universal Marine Insurance Co.* (3) that "the word 'consequences' is a compendious description of the perils to be excepted, and not a description relating to the loss. Instead of saying what particular results are to be excepted, the word 'consequences' is introduced to denote the class of perils which may result from hostilities." In the clause as worded in the charter T. 99 the words "piracy excepted," formally adopted in 1898, show that consequences of capture, seizure and detention are perils insured against causing loss, as piracy is. Further, as Willes J. says (4): "the words 'all consequences of hostilities' refer to the totality of causes, not to their sequence." They are used to save a long enumerative description of incidents of capture seizure or

(1) 36 Times L. R. 108.
(2) 35 Times L. R. 604.
(3) 14 C. B. (N. S.) 274.
(4) Ibid. 290.

H. L. (E.) 1920 — BRITAIN STEAMSHIP CO. v. THE KING. — GREEN v. BRITISH INDIA STEAM NAVIGATION CO. — BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION. — Lord Sumner.

detention or of hostilities or warlike operations, as if one had said "all forms of hostilities or warlike operations of whatever kind," and some form or kind of hostility or warlike operations must have proximately caused the loss. Things of which it can be predicated that they were caused by hostilities are not themselves causes of loss additional to hostilities, or a new description of perils insured against, so that a remote consequence of hostilities would become a recoverable loss, if proximately caused by something itself describable as a consequence of hostilities. From the earliest time when this system of insuring was employed, through all its forms from the American War of Independence (*Tyrie* v. *Fletcher* (1) and *Loraine* v. *Thomlinson* (2)) to the present time, what is insured by the war-risks cover is some peril causing loss which would have been insured against by the Lloyd's policy, if it had not been excepted out of it by some kind of f.c. and s. clause, and "consequences of capture" were never perils insured against under that policy but they were losses by perils insured against, if proximately caused. There is further no analogy to the case dealt with in the Act, s. 55, sub-s. 2 (*a*). That is an express provision in the Act, and the expression precludes the implication of resort to the origin, to which a loss is "attributable," in any dissimilar case not within the express words. I see no connection between expressly disabling an assured from recovering for a loss which, though in itself the proximate consequence of perils by the seas, is really self-inflicted by his ulterior wilful misconduct, and interfering with the statutory rule prescribed in s. 55, sub-s. 1, in a case where an event has happened without fault in any one, and the only question is whether or not it is within the insurance effected.

I think that the judgment of the Court of Appeal was right: that the suppliants' petition fails and that the war risks underwriters were entitled to judgment in the action.

LORD WRENBURY (read by LORD ATKINSON). My Lords, I agree in opinion with my noble and learned friends Lord

(1) (1777) 2 Cowp. 666; 2 Doug. 784. (2) (1781) 2 Doug. 585.

Atkinson and Lord Sumner and shall add only a few words of my own. In the case of each of these vessels the question is whether her loss was a consequence of hostilities or warlike operations within the words "all consequences of hostilities or warlike operations whether before or after declaration of war." As regards the former of the two vessels, the *Petersham*, she was lost by collision with the *Serra* when both vessels in obedience to Admiralty orders were navigating at night without lights. As regards the latter, the *Matiana*, she was lost by running on the Keith Rocks when sailing in convoy and zigzagging with a view to defeating the operation of possible submarines. There were in fact no submarines known or suspected to be in the immediate neighbourhood, but the vicinity was one notoriously dangerous in that respect.

All the decisions have I think proceeded, and in my judgment have rightly proceeded, upon the footing that the word "hostilities" does not mean "the existence of a state of war" but means "acts of hostility" or (to use the noun substantive which follows) "operations of hostility." The sentence may be read "all consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war." To attribute to the word the longer meaning—namely, "all consequences of the existence of a state of war"—would give the expression a scope far beyond anything which one can conceive as intended. To define the meaning of "operation" in this connection is, no doubt, a matter of great difficulty, and for the purpose of these cases is not, I think, necessary.

The question whether there was a warlike operation or not does not turn necessarily on the character of the vessels or vessel. Even a vessel of war is not necessarily engaged at every moment in a warlike operation. Again, the character of the cargo may be irrelevant. In the fact that the holds are filled with (say) cotton or with coal can be found no cause whatever for her (say) coming into collision. On the other hand her cargo may be relevant. If the enemy be a civilized enemy who will do his best to sink a ship carrying troops or munitions of war but will also do his best not to injure a

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.
GREEN v. BRITISH INDIA STEAM NAVIGATION CO.
BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Wrenbury.

hospital ship, the fact that she bears the one character or the other may make all the difference in determining whether action taken against her or by her is a warlike operation. If the case be a case of collision between two vessels and one of them is engaged in a warlike operation, that may be enough. This was the case in *Ard Coasters, Ld.* v. *The King* (1) (affirmed on appeal) where a vessel was lost by collision in the dark with a destroyer which was on patrol duty for the purpose of intercepting hostile submarines, and in the course of that duty was turning across the route which vessels in that part of the ocean would normally and properly follow, with the result that she fouled the route of the *Ardgantock* which was close to her.

If the *British and Foreign Steamship Co.* v. *The King* (2) is right (upon which I feel grave doubt) it must be on a similar ground. I feel great difficulty, however, in saying that from the mere fact that a vessel is a vessel of war and is steaming in her duty as such, it results that if she collides with another vessel and sinks her, the loss is in consequence of a warlike operation. If there be only one vessel and she be not engaged in a warlike operation at all, the words may still be satisfied. Thus, if the enemy has sunk a vessel in a fairway with a view to causing injury to any vessel which enters in ignorance of the fact, or if the enemy has placed false lights with a view to inducing a vessel to think she is on a course which she is not and a peaceful merchantman is consequently lost, the loss is a consequence of the warlike operation of blocking the fairway or deceiving the vessel. So, if a vessel is lost by coming in contact with drifting mines, her loss is a consequence of the warlike operation of laying mines : *Stoomvaart Maatschappij Sophie H.* v. *Merchants' Marine Insurance Co.* (3) Again, a vessel not equipped for war at all may be engaged in a warlike operation if, as in *Henry and MacGregor* v. *Marten* (4), she takes the offensive and attempts to ram what

(1) 35 Times L. R. 604 ; 36 Times L. R. 555.
(2) [1917] 2 K. B. 769 ; [1918] 2 K. B. 879.
(3) (1919) 122 L. T. 295 ; 36 Times L. R. 73.
(4) 34 Times L. R. 504.

she supposes to be a submarine and in so doing is injured. But the leading case of *Ionides* v. *Universal Marine Insurance Co.* (1) draws a line on one side of which lie cases such as those I have mentioned, and on the other lie cases such as those which are before your Lordships. For the present purpose the distinction may, I think, be stated as follows: If the operation relied upon as a warlike operation is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk. But if the peril be directly due to hostile action, it is a war risk. Of the former of these, *Ionides* is an illustration. By reason of the war and for warlike purposes a light had been removed. Had it still been burning the master of the *Linwood* would have had the necessary warning to escape the danger into which he ran. The war did not create the risk but increased it. The cause of the loss was in going ashore. The loss was not a war risk. But, on the other hand, the vessel which tries to ram that which she believes to be an enemy vessel, the vessel which is rammed by a destroyer which is steaming in the dark without lights for a warlike purpose and which necessarily for the due performance of that duty turns across the route which a vessel would normally and properly take in that neighbourhood, and the vessel which is lost by striking a mine, is lost by a new risk originating in and operative by reason of war.

To apply these principles to the two cases before the House: The *Petersham* was lost by collision by reason of navigation in the dark without lights. The risk of collision at night is an ordinary maritime risk. It was aggravated by the removal of the protection of the usual lights of navigation. This is governed by the principle of *Ionides*, which I think was right and which in fact counsel have not attacked. The *Matiana* was lost by going on a reef when sailing in convoy. To sail in convoy is to increase the every-day maritime risk of collision whether with a fixed object or with another vessel, for vessels in a convoy are necessarily not far apart. But

(1) 14 C. B. (N. S.) 259.

H. L. (E.) 1920

BRITAIN STEAMSHIP CO. v. THE KING.
GREEN v. BRITISH INDIA STEAM NAVIGATION CO.
BRITISH INDIA STEAM NAVIGATION CO. v. LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Lord Wrenbury.

there was no new risk. The abandonment of navigation lights in the case of the *Petersham* by way of protection against attack by submarine, the sailing in convoy in the case of the *Matiana* by way of protection against the like attack, are in principle similar. They are devices adopted by way of precaution in time of war which involve greater danger from maritime risks, which exist whether there is war or not. Their object is to give greater security to peaceful operations.

It has been argued that to sail in convoy is a warlike operation. It is an operation adopted in time of war, but this does not, I think, make it a warlike operation. Not offence only but defence also may, no doubt, be a warlike operation, but a precautionary measure is not in itself a measure of defence. If it becomes necessary to use the weapon of precaution, no doubt a defence may commence. Thus, if here submarines had been sighted and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war—namely, submarine attack—and in consequence a vessel had gone on the rocks, the case would, I think, have been different. But there was no such case. Further, even if sailing in convoy were a warlike operation the loss no doubt occurred in the course of, but how did it result in consequence of, that operation? The ship went on the reef not because she was in convoy—surrounded, that is, by other ships, bound to act under the order of the escorting ship and so on—but because she did not know where she was and did not know of the danger.

My Lords, these stated quite shortly are the reasons which lead me to the conclusion that in neither case was the loss a consequence of hostilities or warlike operations. In my judgment both the appeals should be dismissed with costs.

BRITAIN STEAMSHIP CO. *v.* THE KING.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 12, 1920.

Solicitors for the appellants: *Holman, Fenwick & Willan.*
Solicitor for the respondent: *Treasury Solicitor.*

GREEN AND OTHERS *v.* BRITISH INDIA STEAM NAVIGATION CO., LD.

BRITISH INDIA STEAM NAVIGATION CO., LD. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LD.

[H. L. (E.)] 1920

BRITAIN STEAMSHIP CO. *v.* THE KING.

GREEN *v.* BRITISH INDIA STEAM NAVIGATION CO.

BRITISH INDIA STEAM NAVIGATION CO. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION.

Orders of the Court of Appeal affirmed and appeals dismissed with costs.

Lords' Journals, July 12, 1920.

Solicitors for Green and Others: *William A. Crump & Son.*

Solicitors for British India Steam Navigation Co., Ld.: *Waltons & Co.*

Solicitors for Liverpool and London War Risks Insurance Association, Ld.: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

ELLIOTT STEAM TUG COMPANY, LIMITED, APPELLANTS;

AND

COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM . . . . } RESPONDENTS.

PAGE AND OTHERS . . . . . APPELLANTS;

AND

COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM . . . . } RESPONDENTS.

H. L. (E.)* 1920 *July* 1.

Ship—Salvage—Tug requisitioned by Admiralty—Demise of Tug to Crown—Right to Salvage—Merchant Shipping (Salvage) Act, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

A tug was requisitioned by the Admiralty, acting under the powers of the Royal Proclamation of August 3, 1914, upon a gross basis of hire, i.e., the owners were to pay the wages of the officers and crew and all

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD SUMNER.

H. L. (E.)
1920
ELLIOTT STEAM TUG CO. v. ADMIRALTY COMMISSIONERS.
PAGE v. ADMIRALTY COMMISSIONERS.

the running expenses of the steamer and were to undertake all risks except war risks; and it was agreed that all salvage was to be for the owners' benefit. Subsequently, with the consent or acquiescence of the owners, the basis of hire was changed from gross to net, and thereafter the master and crew became the servants of the Crown and the tug was employed at the sole risk and expense of the Admiralty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—

Held, that the change in the basis of hire imported a demise of the tug to the Admiralty, and that therefore, in the absence of any express stipulation to the contrary, the Admiralty, and not the owners of the tug, were entitled to the salvage award.

Decision of the Court of Appeal [1919] 1 K. B. 299 affirmed.

APPEALS from two orders of the Court of Appeal, dated December 3, 1918 (1), affirming a judgment of Bailhache J. (2) and a judgment of Hill J.

The respondents, the Admiralty Commissioners, were the charterers of the tug *Conqueror* which belonged to the appellants Page and others, and of the tug *Warrior* which belonged to the appellants the Elliott Steam Tug Co.

In January, 1917, the *Conqueror* rendered salvage services to the steamship *Sussex* near Dunkirk, and the amount of salvage money payable for these services was assessed at 4500*l*. In February, 1917, the *Warrior* rendered similar services to the steamship *Messina* near Queenstown and the amount of salvage money was assessed at 350*l*. The question in each case was whether the legal owners or the Admiralty were entitled to the benefit of these services.

Bailhache J., in the case of the *Conqueror*, and Hill J., in the case of the *Warrior*, decided this question in favour of the Admiralty, and appeals from these judgments were dismissed by the Court of Appeal (Swinfen Eady M.R., Duke L.J. and Eve J.). The facts are stated in the report of the case in the Court of Appeal and in the judgment of the Lord Chancellor.

Stuart Bevan K.C. and *Van den Berg* for the appellants. The change in the terms of hiring from gross to net did not do away with the provision that all salvage was to be for the owners' benefit. It is admitted that the change in the

(1) [1919] 1 K. B. 299. (2) [1918] 2 K. B. 447.

terms constituted a demise of the tugs to the Admiralty, but it was a demise with a condition that the Admiralty should remit the salvage to the appellants. The course of business as to other tugs similarly placed is relevant to show what the parties understood by the change from gross to net. In the case of two other tugs belonging to the appellants, the *Vanquisher* and the *Revenger*, the terms were altered from gross to net, yet the appellants, with the assent of the respondents, were paid for salvage services rendered by those tugs. The true inference from the facts is that at the time the alteration was made both parties treated the appellants' right to salvage as unaltered. The appellants raise no point upon the effect of the Merchant Shipping (Salvage) Act, 1916.

Sir Gordon Hewart A.-G., *MacKinnon K.C.* and *Dunlop K.C.* for the respondents were not called on.

LORD BIRKENHEAD L.C. My Lords, this is an appeal from two orders of the Court of Appeal dated December 3, 1918, which affirmed a judgment of Bailhache J., which was delivered on May 30, 1918, in favour of the respondents, and a judgment of Hill J. of July 29, 1918, also in favour of the respondents. The actions were consolidated and the issues raised in the two cases are identical. The questions involved in the appeal are whether the appellants, as against the respondents, are entitled to be paid the sums respectively of 4500*l.* and 350*l.*, and these questions depend upon the rights as between the appellants and the respondents to the benefit of salvage services rendered by the tug *Conqueror* to steamship *Sussex* in January, 1917, and by the tug *Warrior* to steamship *Messina* in February, 1917.

My Lords, with the outbreak of war it became necessary for the Admiralty to requisition a number of tugs for the service of the armed forces of the Crown, and amongst others the tug *Conqueror* and the tug *Warrior* were requisitioned in the early days of the war—the *Warrior* on August 7, 1914, the *Conqueror* on October 4, 1914. No charterparty was ever executed between the owners of these tugs and the Admiralty, but it was agreed between the parties that the tugs should

H. L. (E.) 1920 — ELLIOTT STEAM TUG CO. v. ADMIRALTY COMMISSIONERS. — PAGE v. ADMIRALTY COMMISSIONERS. — Lord Birkenhead L.C.

be taken upon the basis of a charterparty, sometimes known as the Expeditionary Force Charterparty, sometimes as "T 99." The charterparty in question contained a clause 11 which is in the following terms: "The owners shall provide and pay for all wages, provisions, and all other expenses in connection with the Captain, Officers, Engineers and Crew, for the insurance of the steamer, for all deck and engine room stores, water for all purposes, for the proper ventilation of the cargo, for boats, for ballast necessary to enable the vessel to proceed with safety without cargo, and for the maintenance of the steamer in a thoroughly efficient state in hull and machinery during the service." The clause which I have just read has been described in the correspondence and in the judgments in the Courts below as the gross clause. The term is not, perhaps, particularly expressive, but for the sake of clearness it may be retained. Another clause of the charterparty should be specifically referred to, clause 29, which is as follows: "The steamer has liberty to assist vessels in distress, and to deviate for the purpose of saving life. All salvage to be for owners' benefit, but ship to be deemed off pay during the time occupied in salvage operations."

The reasonableness of these two provisions is apparent. The arrangement being that the owners should provide and pay wages and provisions and all other expenses, the very reasonable stipulation is contained in the later clause to which I have called attention that all moneys which may be recoverable under the head of salvage should accrue to the owners' benefit. The arrangement so made was at a later date varied. In September, 1916, an agreement was made between the parties by which the *Conqueror* passed from what I may term the gross basis to a net basis, and a similar arrangement was made in January, 1917, in the case of the *Warrior*. My Lords, the causes which led to the modification of the original agreement do not, it seems to me, very greatly concern us. The change was in fact made, and the correspondence between the parties is the only record of that which the parties intended at the time when this modification was made. The Admiralty proposed that the change should

be made, and it is very important to consider what was the attitude at that time assumed by the appellants. It is, perhaps, equally important that the extent and the importance of the change should be clearly grasped.

The change was of such a kind that the *Conqueror* and the *Warrior* at the time of the respective salvage services were commissioned as His Majesty's ships. The masters and crews were servants of His Majesty. The masters held commissions as lieutenants in the Royal Naval Volunteer Reserve, and the other members of the crews received from the Admiralty and wore uniforms according to their rank; they were naval ratings, and the wages and victualling allowances were paid by the Admiralty. The tugs were in the possession and control of the Admiralty. All the running expenses of the tugs and their employment were payable and paid by the Admiralty and not by the owners. The tugs were employed at the sole risk of the Admiralty as regards all risks except fair wear and tear. Such was the nature of the change which was proposed by the Admiralty to the owners, and it must be assumed that the owners realized at once what the nature of the proposal was and what the inevitable consequences of such a proposal must be upon the salvage clause of the earlier agreement. They knew or must be taken to have known that the charter had become a demise charter. Receiving a proposal involving necessarily a modification so profound in the agreement between themselves and the respondents they make no observation or reservation of any kind; in other words, they are informed that a change is made in the arrangement between themselves and the Admiralty of such a character as to render it highly irrational and unusual that they should thereafter attempt to establish any claim for salvage; they acquiesce without protest in the making of this change, and they do not suggest any stipulation on their behalf in relation to salvage.

It was attempted by counsel for the appellants to argue that, because in an earlier case where a tug belonging to the appellants had been requisitioned by the Admiralty upon the net basis a claim to salvage had been made by the appellants

H. L. (E.) 1920 — ELLIOTT STEAM TUG CO. v. ADMIRALTY COMMISSIONERS. — PAGE v. ADMIRALTY COMMISSIONERS. — Lord Birkenhead L.C.

without resistance from the Admiralty, it must be taken that the Admiralty intended when they placed the tugs in question on the net basis that any salvage payment should in this case also inure to the benefit of the appellants. I am not able to accept this contention. At the period in question the Act 6 & 7 Geo. 5, c. 41 had not become law, and I entirely decline to draw any inferences from the omission on the part of the Admiralty to intervene in the earlier salvage case; for this omission occurred at a moment when they had no legal title or claim on which they were concerned to insist.

The general contention of the learned counsel for the appellants has been of this kind. They say that originally the appellants were entitled to salvage. For its own purpose the Admiralty proposed a modification of the original agreement. It would have been possible to effect that modification without in any way altering the right to salvage payment which under the earlier agreement belonged to the appellants. The respondents did not attempt expressly to modify that provision and it must therefore be assumed to have survived. The answer to this contention is that the later agreement by its substance destroyed those circumstances in the earlier contract which, and which alone, rendered either usual or proper the payment of salvage to the appellants. Under these circumstances, and in the absence of any stipulation to the contrary, it must be assumed that the right of salvage on behalf of the owners disappeared when the earlier agreement was modified. It was, in other words, for the appellants who acquiesced in a charter by demise to make an express reservation or stipulation if they wished to exclude from such a charter the legal effect which it normally produces.

My Lords, in my judgment this is a very clear case. The appeal fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT FINLAY. My Lords, I entirely agree that the appeal in this case fails.

The whole question is, what was the effect of the transfer

of these two tugs from what has been called the gross basis to the net basis ? So long as the tugs were employed upon the gross basis the vessel was run by the owner and he received a sum estimated on the footing that he was to incur all the expenses connected with the running of the vessel. When the basis was changed to the net basis that is entirely done away with ; the expense of running the vessel was after that with the Admiralty, and the sum that was paid was in effect a sum only for the demise of the ship to the Admiralty. Now this change from the gross to the net basis took place in September, 1916, and in January, 1917, so that both vessels by January, 1917, were upon the net basis.

Now, my Lords, what was the effect of that ? The effect was that the crew were no longer in the service of the owner ; it therefore became quite impossible that salvage services should be rendered on behalf of the owner so that the owner would be entitled to receive payment for such salvage services. We had, if I may say so, a very interesting and admirable argument from Mr. Van den Berg upon this point, but I confess that I remain entirely unconvinced. It seems to me that it really does not matter that the owners of these tugs did not think of the effect the change would have upon salvage. They agreed to the change being made, and the question is, what in law is the result of that change ; and it is utterly immaterial that it never occurred to the owners to think of that change in its effect upon salvage if salvage should be earned.

It was very much pressed upon us that the idea with regard to the *Conqueror* came from the owners of the *Conqueror*. In the case of the *Conqueror*, indeed, it was suggested by the master of the tug and he wrote a letter addressed to his employers, the Elliott Steam Tug Co., saying that it was very desirable for the protection of the master and the crew that they should wear the King's uniform ; the phrase used was that they might be shot as pirates if they were not in uniform and were caught doing the work they were doing. Well, my Lords, of course if they were to wear the King's uniform they must enter into the

H. L. (E.) 1920

ELLIOTT STEAM TUG CO. v. ADMIRALTY COMMISSIONERS.

PAGE v. ADMIRALTY COMMISSIONERS.

Viscount Finlay.

King's service, and after that letter of August 3 was written it was taken into consideration and the result was that by the letters which passed in September, the master and crew were taken into the service of the Crown, the master receiving a temporary commission and the basis of hire being altered from gross to net. The change was complete, and it matters not in the slightest degree that the reason why they suggested the change was the desire, and the very proper desire, of the master and crew for the more complete protection which the King's uniform would give them.

In the case of the *Warrior* the proposal, I think, came from the Admiralty on the ground that the discipline of the men on the *Warrior* left something to be desired and that it was necessary, in order that discipline should be completely established, that they should become the crew of the Crown, and the men accordingly signed articles under the Admiralty. I am not going to refer again to the letters which have just been read; it is perfectly clear that from that time they became the servants of the Crown. There again you have it clear that all possibility of the earning of salvage for the owners after that was cut away.

Then, what remains of the case? It is simply this—the suggestion that, although that had taken place, you could spell out an agreement between the Admiralty and the owners of these tugs that any salvage after that earned by the Crown's servants in charge of these tugs should be handed over to the owners of the tugs. Well, I have listened attentively to all that has been said upon this point, and I really cannot find a trace of any such agreement. The truth is that when the change was made and the parties agreed to the change, the owners of the tugs, and I daresay the Admiralty, never thought about its effect upon salvage; but the change was made, and the only question now is, in the absence of any extraordinary agreement such as that suggested to vary the rights of the parties, what in law is the effect of the transference of the crews from the service of the owners of the tugs to the service of the Crown?

The appeal fails and must be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. In the course of the argument I put to the learned counsel for the appellants this question: Was it or was it not admitted that at the time when these salvage services were rendered the tugs rendering these services were the subject of demise to the Admiralty? The learned counsel after consideration admitted, as was natural and necessary, that there was such a demise. The demise was, in a word, effected by a change of the transaction between the Crown and the owners having been made from gross to net.

When a change takes place from gross to net this operates as a complete supersession of the gross agreement. It must necessarily be so, because under the net agreement, as has been admitted, a demise to the Crown takes place; the servants become the servants of the Crown; salvage is rendered by the Crown through its servants and not through the servants of the owners.

The proposition in law thus arising brings us to very familiar ground. It is well stated in the judgment of Bailhache J. which I thus quote (1): "The legal effect of a Charter Party which is by way of demise is that if salvage services are rendered by a vessel under such a Charter Party and an award is made for such services, the money when an award is made for such services goes not to the owners but to the charterers, who have the vessel upon time charter." Hill J., in the case of the *Warrior*, assented to that as being a proper statement of the law; it was also assented to by the Court of Appeal, and I entirely agree with it.

LORD MOULTON. My Lords, I agree.

LORD SUMNER. My Lords, I agree. I only desire to put it on record that as the point which was elaborately discussed in the Court of Appeal upon the true construction of the Merchant Shipping Act, 1894, and the Merchant Shipping (Salvage) Act, 1916, has not been

(1) NOTE.—This quotation is taken from the Appendix.

H. L. (E.) 1920 ELLIOTT STEAM TUG CO. v. ADMIRALTY COMMISSIONERS. PAGE v. ADMIRALTY COMMISSIONERS.

raised in your Lordships' House, it has been unnecessary for your Lordships either to express or to form any opinion as to its correctness.

Orders of the Court of Appeal affirmed and appeals dismissed with costs.

Lords' Journals, July 1, 1920.

Solicitors for the appellants : *Thomas Cooper & Co.*
Solicitor for the respondent : *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1920 *July* 16.

LORD ADVOCATE . . . . . APPELLANT ;

AND

JAFFREY AND OTHERS. . . . . RESPONDENTS.

Domicil—Succession—Husband and Wife—Misconduct of Husband justifying Decree for judicial Separation or Divorce—Wife living apart from Husband—Change of Domicil by Husband—Bigamy.

In the absence of a decree for judicial separation, conduct by the husband which would have enabled the wife to obtain such a decree if she had applied for it, or which would have justified her in point of law in refusing to live with her husband, cannot, after her death, be sufficient to establish that she had a domicil of her own different from that of her husband.

Dicta of Lord Cranworth in *Dolphin* v. *Robins* (1859) 7 H. L. C. 390 considered.

Dictum of Sir Robert Phillimore in *Le Sueur* v. *Le Sueur* (1876) 1 P. D. 139, 142 disapproved.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary.

The question raised by this appeal was as to the domicil

* *Present :* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

of the late Mrs. Isabella Henderson Mackinnon, the wife of the late Robert Mackinnon, and upon the decision of this question depended the questions whether legacy duty was exigible in respect of her movable estate and whether succession duty was payable not merely in respect of her heritable property in Scotland but in respect of her whole estate.

Mrs. Mackinnon was married on June 26, 1878, to Robert Mackinnon, who was born in Campbeltown, Argyllshire, and was at the time of his marriage a Chief Quartermaster in the Navy. He retired from the Navy with the rank of Chief Petty Officer in October, 1886. From that time he resided with his wife in Aberdeen until 1893. Of this marriage there were four children all of whom predeceased their mother. In 1893, owing to his drunken and dissipated habits, it was arranged, at the instance of his wife, that Mackinnon should leave Scotland for Australia, and his passage out was paid by his wife's mother. He landed in Sydney and remained for a time in New South Wales, but some time before July, 1902, he went to Queensland and resided in Brisbane until his death on January 7, 1918. On July 2, 1902, he went through a form of bigamous marriage with a woman named Wilhelmina Bennett, with whom he lived until his death, and by whom he had two children. Mackinnon was engaged in casual work, but his main source of income was from the pension which he drew from the Admiralty. After his departure from Scotland no communication passed between him and his wife.

In 1915 Mrs. Mackinnon, who continued to live in Aberdeen, raised an action of divorce against her husband in the Court of Session on the grounds of desertion and adultery, but the action fell in consequence of her death, which occurred on September 9, 1915.

In these circumstances two questions arose: 1. Whether at the date of Mrs. Mackinnon's death Robert Mackinnon had acquired a domicil in Queensland, and 2. if so, whether Mrs. Mackinnon had a derivative domicil in Queensland by virtue of the marriage still subsisting between them. These questions were raised by an action brought by the respondents, the trustees acting

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY.

under the trust disposition and settlement of the late Mrs. Mackinnon, against the appellant, as representing the Commissioners of Inland Revenue, for a declaration that the testatrix died domiciled in Queensland and that consequently the duties in dispute were not exigible.

The Lord Ordinary (Lord Ormidale) was of opinion (1.) that Mackinnon had abandoned his Scottish domicil and had acquired a domicil in Queensland, but (2.) that in the special circumstances of the case his wife's domicil remained Scottish. The First Division (Lord Mackenzie, Lord Skerrington and Lord Cullen) unanimously affirmed the opinion of the Lord Ordinary upon the first point, but (Lord Mackenzie dissenting) reversed his decision upon the second point and held that the wife's domicil was also in Queensland.

1920. June 21, 22. *J. B. Morison L.A.* (with him *R. C. Henderson* (of the Scottish Bar)) for the appellant. It is conceded that prima facie the rule is that the domicil of the husband is the domicil of the wife, but that rule is subject to exceptions. The rule is founded on the duty of the wife to adhere to her husband and the reason for the rule is that prima facie the home of the husband is the home of the wife ; but where the husband by his misconduct has rendered the wife's duty to live with him impossible the reason for the rule ceases and the rule ceases also. The fair inference from the facts is that the change in the husband's domicil was in consequence of his misconduct—misconduct which justified both a decree of judicial separation and a decree of divorce. In these circumstances the original domicil of the parties remains in the wife. It is not contended that the wife could have created a new domicil in France or elsewhere, but it is submitted that she retained her Scottish domicil. In *Dolphin* v. *Robins* (1) Lord Cranworth thought that there might be exceptional cases to which, even without a judicial separation, the rule would not apply, and he gives as an illustration the case of a husband who has deserted his wife and established himself permanently in a foreign

(1) 3 Macq. 563, 579; 7 H. L. C. 390, 418.

country; and in *Le Sueur* v. *Le Sueur* (1) Sir R. Phillimore accepted Lord Cranworth's dictum.

[VISCOUNT HALDANE. Lord Kingsdown in *Dolphin* v. *Robins* (2) did not agree with that dictum and thought that even a judicial separation would not enable the wife to acquire a separate domicil, and Lord Campbell (3) thought it clear that the mere consent of the husband that the wife should live elsewhere would confer no right upon her to acquire a foreign domicil: see also Dicey's Conflict of Laws, 2nd ed., pp. 132, 134.]

The dictum of Lord Cranworth is again referred to by Swinfen Eady J. in *In re Mackenzie* (4) as establishing a possible exception to the general rule.

[Counsel also contended on the evidence that the husband had not acquired a domicil in Queensland, but upon this point the House did not call upon the respondents.]

[The following authorities were also referred to: *Le Mesurier* v. *Le Mesurier* (5); *Ogden* v. *Ogden* (6); *Cooper* v. *Cooper* (7); *Armytage* v. *Armytage* (8); *Huntley* v. *Gaskell* (9); *Redding* v. *Redding*. (10)

Alex. Moncrieff K.C. (with him *T. M. Cooper*) (both of the Scottish Bar) for the respondents. The general rule is clearly established that the domicil of the wife follows that of her husband. This rule is founded, not solely on the wife's duty to adhere to her husband, but on the indissoluble union which is asserted in law between husband and wife, and the universality of the rule has been recognized by this House. Thus a voluntary separation has been treated as not dissolving that unity which the law regards as the distinguishing feature of marriage: *Warrender* v. *Warrender* (11); and the decision in *Dolphin* v. *Robins* (12) itself shows that misconduct by the husband such as would debar him from demanding his wife's

(1) 1 P. D. 139, 141, 142.
(2) 3 Macq. 581.
(3) Ibid. 584.
(4) [1911] 1 Ch. 578, 594.
(5) [1895] A. C. 517.
(6) [1908] P. 46, 82.
(7) (1888) 13 App. Cas. 88; 15 R. (H. L.) 21.
(8) [1898] P. 178.
(9) [1906] A.C. 56; 8 F. (H. L.) 4.
(10) (1888) 15 R. 1102.
(11) (1835) 2 Sh. & M. 154, 192; 2 Cl. & F. 488, 523.
(12) 3 Macq. 563.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY.

adherence will not enable the wife to have a separate domicil. The appellant's argument is founded solely upon Lord Cranworth's dictum, which was not concurred in by the other noble and learned Lords who took part in the decision in *Dolphin* v. *Robins* (1) and which is hardly consistent with previous passages in Lord Cranworth's own judgment. After discussing the effect of a judicial separation Lord Cranworth says that "it does not at all follow that it can be open to any one, after the death of the wife, to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right. . . . . It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper." The decision in *Dolphin* v. *Robins* (1) gives effect to that view and is a direct authority in the respondents' favour. It may be conceded for the purposes of this appeal that a decree of judicial separation justifies the wife in acquiring a separate domicil, but Lord Kingsdown suggests a doubt as to this, and the matter is entirely open as regards this House. But nothing short of an actual decree is sufficient for that purpose. Assuming that a decree of judicial separation has that effect difficulties as to jurisdiction might arise. Remedies for matrimonial misconduct short of dissolution may be administered by the Courts of the country in which the parties are for the time resident without regard to domicil, but dissolution itself depends solely on the domicil of the parties. If then a decree of judicial separation is to result in laying the foundation for a new domicil and either party sued for a divorce a vinculo, there would be concurrent jurisdiction in the Courts of two countries, possibly viewing the same matter from different points of view, and the question would arise, Which of the two Courts should grant the decree? This view of the effect of a decree of judicial separation involves the subversion of the

(1) 3 Macq. 563.

principles laid down by the Privy Council in *Le Mesurier* v. *Le Mesurier* (1), which proceeds on the basis that there is one domicil and one law applicable to both spouses and that the domicil which is to determine the law applicable to personal and domestic relations is the same as the domicil of succession. Further, the Legislature by making special provision in the Conjugal Rights (Scotland) Amendment Act, 1861, for the destination of the after-acquired property of a wife who has obtained a decree of judicial separation must be taken to have assumed that the decree did not operate a separation of domicil.

Morison L.A. in reply referred to Stair's Institutes I., iv., 9.

The House took time for consideration.

1920. July 16. VISCOUNT HALDANE (read by VISCOUNT CAVE). My Lords, on the first of the questions argued by the Lord Advocate, that as to whether Robert Mackinnon, the husband of the testatrix, died domiciled in Queensland, I think there can be no doubt that our answer must be in the affirmative. The evidence adduced and the concurrent findings of the two Courts below are conclusive as to this. A more serious question is, however, raised independently of this answer. It is said that, as her husband had contracted in 1902 a bigamous marriage at Brisbane, and was in effect living in adultery, the testatrix could not have been compelled to live with him, and indeed could have obtained a divorce against him. As the result of this, which may well be true, it is further said that she could and did acquire an independent domicil in Scotland where she died, and that consequently the right to succeed to her movable estate and the liability to legacy duty depended on the law, not of Queensland but of Scotland.

My Lords, I think it is clear that the one question on which what remains turns is whether, in the circumstances, the lady had acquired a particular and definite juridical status independent of her husband. The status I refer to must be one

(1) [1895] A. C. 517.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Viscount Haldane.

which would have enabled her to invoke a Court, other than that of her husband's domicil, as having jurisdiction to dissolve her marriage. That status must also have been such that the succession to her movables came to depend on the law of her domicil instead of his. My Lords, it may well be that, as was said by Lord Watson in *Le Mesurier* v. *Le Mesurier* (1), there may be residence, without the acquisition of complete domicil, sufficient to sustain proceedings for restitution of conjugal rights, for separation, or for aliment. But the status which such residence can confer is far short of that which domicil proper confers. As was pointed out by Lord Watson (2), agreeing with what was said by Lord Westbury in *Shaw* v. *Gould* (3), the accepted canon of international law is expressed in the words which they both quote from Rodenburg: "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solum modo Judici, et quidem Domicilii, universum in illâ jus sit attributum." Since *Le Mesurier* v. *Le Mesurier* (1) was decided in terms that gave effect to the spirit as well as to the letter of this principle, it has been clear that nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce, and that the old notion is now obsolete, that there can be, short of such a full domicil, a so-called "matrimonial domicil" which can give the same result. I think that it is implied as a consequence not less plain, that there can be only one real domicil. Not only is there no authority for the proposition that under the laws of these islands husband and wife can have, while they continue married, distinct domicils, but if it were otherwise the consequences in such circumstances as those before us would be extraordinary. Proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results. The status itself resulting from marriage might become modified without judicial interposition. The very evils, the exclusion of which has been said by eminent writers on international

(1) [1895] A. C. 517, 526. (2) Ibid. 538.
(3) (1868) L. R. 3 H. L. 55, 83.

law to require the acceptance of the principle of domicil unrestrictedly, would be again introduced, and introduced under conditions so vague that no definite limit could be assigned to their operation.

My Lords, I have considered the authorities referred to by the Lord Advocate in his argument at the Bar. They are not everywhere completely consistent, and there are expressions in them which are not always easy to reconcile. But the principle on which the conclusions to which I have just referred are based is no new one. It is the foundation of the judgment of this House in *Warrender* v. *Warrender* (1), and in no decision which I have found and which is binding on your Lordships has it been departed from. More I do not think it necessary to say. I move your Lordships that this appeal be dismissed with costs.

VISCOUNT FINLAY. My Lords, the question in the present case is whether the late Mrs. Isabella Watson, or Mackinnon, the testatrix, was, at the time of her death, domiciled in Queensland, and the liability of the estate in respect of legacy duty and succession duty depends upon the answer to this question. The inquiry falls under two heads :—

(I.) Had Robert Mackinnon, the husband of the testatrix, acquired, at the date of her death, a domicil in Queensland ?

(II.) If he had, was the testatrix, as his wife, also domiciled in Queensland ?

Robert Mackinnon was born and brought up in Scotland. He served in the Royal Navy for twenty-four years. In 1878 he married the testatrix, and from 1886 when he retired from the Navy with a pension until 1893 he resided with her in Scotland. He had contracted drunken and dissipated habits in consequence of which arrangements were made by the testatrix through her law agent for his leaving this country and going to Australia, the expense of his passage being paid by his mother-in-law. He landed at Sydney, and after some time went thence to Queensland, where he remained until his death in 1918. There was no communication

(1) 2 Cl. & F. 488.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Viscount Finlay.

whatever between him and the testatrix from the time when he left this country in 1893. He resided at various places in Queensland, latterly (for some seven years) at Brisbane, and never expressed any desire to return to Scotland. In 1902 he contracted a bigamous marriage with a woman in Queensland, who lived with him until his death. His domicil, when he arrived in Australia, was unquestionably Scottish. The Lord Ordinary (Lord Ormidale) found that, having regard to his long-continued residence in Queensland, he acquired a domicil of choice in Queensland, and that this domicil had been acquired at the date of his wife's death. There was an appeal to the First Division, and all the judges, Lord Mackenzie, Lord Skerrington, and Lord Cullen, concurred with the Lord Ordinary in holding that Robert Mackinnon had acquired, before his wife died, a domicil in Queensland. There are, therefore, concurrent findings upon this point by the Court in the first instance and the Inner House. The burden of proving a change of domicil is, of course, upon those who assert it. As both the Courts below have found that there was in this case such a change of domicil I do not think that upon the facts in evidence in this case it would be proper to disturb the conclusion at which they have arrived. It must therefore be taken that Robert Mackinnon was, at the date of the death of the testatrix, domiciled in Queensland.

It remains to consider whether the testatrix, as the wife of Robert Mackinnon, shared his domicil in Queensland. On this point the judges in the Court of Session were equally divided. The Lord Ordinary in the first instance, and Lord Mackenzie in the Inner House, took the view that under the special circumstances of this case the ordinary rule that the domicil of the wife is that of the husband had no application, and that she retained her Scottish domicil. But the majority of the judges in the Inner House held that there were no circumstances in the present case sufficient to exclude the application of the rule of law that the domicil of the wife is that of the husband. The appellants, the Commissioners of Inland Revenue, relied upon what was said by Lord Cranworth

in *Dolphin* v. *Robins* (1) and by Sir Robert Phillimore in the case of *Le Sueur* v. *Le Sueur*. (2) Lord Cranworth in the first of these cases indicated that the inclination of his opinion was that if the wife had obtained a decree of judicial separation that would be enough to exclude the general rule as to the domicil of a wife being that of her husband. He observed, however, that it did not at all follow that the existence of facts which would have enabled the wife to obtain a decree for judicial separation would have the same effect in the absence of an actual decree. Lord Cranworth added that there might be exceptional cases which, even without a judicial separation, would exclude the general rule. He refers to cases in which the husband "has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony, and been transported." The first and third of these cases need not be considered. The abjuration of the realm has disappeared with the right of sanctuary, and transportation for felony would not in itself involve a change of domicil on the part of the husband. As regards the second case suggested by Lord Cranworth—desertion—there was as a matter of fact in the present case no desertion by the husband. On the contrary, it was at the express desire of the wife that, no doubt for very sufficient reasons, he was shipped off to Australia. In *Le Sueur* v. *Le Sueur* (2) Sir Robert Phillimore expressed the opinion that desertion by the husband would entitle the wife, without a decree of judicial separation, to choose a new domicil for herself. For the reasons which I shall hereafter state this opinion appears to me to be erroneous, and I am unable to concur with the decision given by Sir Robert Phillimore upon this point.

As no judicial separation was obtained in the present case it is unnecessary and undesirable to express any opinion on the question whether such a decree would have prevented the wife's domicil from following that of the husband. This is a point of great importance, and its decision should be deferred until it arises on the facts of some particular case.

(1) 3 Macq. 563, 579; 7 H. L. C. 390, 418. (2) 1 P. D. 139, 142.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Viscount Finlay.

What we have to consider is whether, in the absence of any judicial decree, conduct by the husband which would have enabled the wife to obtain such a decree if she had applied for it, or which would have justified her in point of law in refusing to live with her husband, can, after her death, be sufficient to establish that she had a domicil of her own different from that of her husband. It appears to me clear that it cannot.

The view that I take upon this point is in accordance with the opinion of Lord Cranworth himself in a passage in his judgment in *Dolphin* v. *Robins* (1), to which I have already referred. There was no desertion by the husband either in going to Australia, which was at the instance of his wife, or in his remaining there, which was by her desire. The fact, however, that Robert Mackinnon contracted a bigamous marriage in Australia would undoubtedly have enabled the wife, if she had sued in the proper tribunal, to obtain a decree of judicial separation. But there are the strongest reasons for saying that, however clear the facts may be that the wife was not bound to adhere, this cannot of itself suffice to prevent the wife's domicil being that of her husband. That questions of succession should depend upon an inquiry after the death of the parties into their conduct would be dangerous in the last degree. It would introduce great uncertainty as to the rights of the parties to the succession, and when the parties are dead it might not be possible to arrive at any satisfactory conclusion upon such a question of fact. Lord Kingsdown, in *Dolphin* v. *Robins* (2), expressed dissent from Lord Cranworth's dicta as to the effect of a judicial separation in questions of succession. However this may be, it appears to me that it would be contrary to all principle to allow succession to be regulated by the result of an inquiry after death as to the existence of circumstances which might have given ground for a decree.

A great many authorities have been referred to on the subject of marriage and domicil which suggest most interesting

(1) 3 Macq. 563, 578; 7 H. L. C. 390, 417.

(2) 3 Macq. 563, 581; 7 H. L. C. 390, 420.

questions for consideration. These questions, however, it is, for purposes of the present case, quite unnecessary to consider. I rest my decision simply on the fact that the testatrix died without obtaining a decree for judicial separation, and that therefore the ordinary rule of law as to domicil must be applied. As to the existence of the rule, there is no doubt. It would be at once undesirable and mischievous to enter into an examination of the reasons on which the rule was based, and, if it should appear on inquiry after the death of one or both of the parties that these reasons might not apply in any particular case, to say that the rule should be treated as inapplicable.

In my opinion this appeal should be dismissed.

VISCOUNT CAVE. My Lords, the appellant, the Lord Advocate, put forward two contentions—namely, first, that there is no proof that Robert Mackinnon had lost his Scottish domicil and acquired a domicil in Queensland, and, secondly, that even if this be proved, his misconduct in Queensland had the effect of excluding the general rule that the domicil of the wife follows that of her husband, and accordingly that Mrs. Mackinnon retained her Scottish domicil. As to the first question, which is one of fact, I agree entirely with the findings of the Lord Ordinary and the First Division of the Court of Session. Mackinnon in 1893 signed a contract of separation from his wife and with her consent, and indeed by her desire, emigrated to Australia. In or about 1899 he went to Brisbane and settled there. In 1902 he contracted a bigamous union with a woman by whom he had children, and lived with her in or near Brisbane until his wife's death in 1915, and thenceforth until his own death in 1918. I think it is clear that he abandoned his Scots domicil and acquired a domicil in Queensland in or before 1902. Upon the second question, which is one of law, the argument put forward by the appellant was to the effect that the rule as to a wife's domicil following that of her husband is founded upon the duty of the wife to live with her husband; that by reason of Mackinnon's unfaithfulness his wife was freed from that

H. L. (Sc.) 1920 — LORD ADVOCATE v. JAFFREY. — Viscount Cave.

obligation; and that accordingly the rule as to domicil had no application to her. The decision of the Lord Ordinary to the above effect was reversed by the First Division, and your Lordships have to determine whether it should be restored.

My Lords, I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie: see Code XII., i., 13; Stair I., iv., 9; Phillimore on Domicil, s. 40. And while the rule is no doubt abrogated by a divorce a vinculo, and possibly (although this has not yet been finally decided) by a divorce a mensa et thoro or a judicial separation, I do not think there is any reliable authority for the proposition that the mere existence of grounds for a decree of divorce or separation is of itself enough to enable a wife to set up a separate domicil. Indeed, the decision of your Lordships' House in *Dolphin* v. *Robins* (1) appears to be an express authority to the contrary. In that case the wife of a domiciled Englishman, having obtained in Scotland a decree of divorce on the ground of her husband's adultery in that country, went through a ceremony of marriage with a domiciled Frenchman and lived with him in France until her death. It was held, first, that the Scottish decree of divorce was void, as there was no Scottish domicil, and secondly (on an argument first raised in this House), that the adultery of the husband did not entitle the wife to choose a domicil for herself in France. On the latter point Lord Cranworth said (2): "It was, indeed, argued strongly, that here the facts show, that the husband never could have compelled his wife to return to him. The allegation of the appellant, it was contended, contains a distinct averment that the husband had committed adultery; and this would have afforded a valid defence to a suit for restitution of conjugal rights, and so would have enabled the wife to live permanently apart from her husband, which, it is alleged, he agreed she should be at liberty to do. But this is not by any means equivalent to a judicial sentence.

(1) 7 H. L. C. 390. (2) Ibid. 417.

It may be that where there has been a judicial proceeding, enabling the wife to live away from her husband, and she has, accordingly, selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture. But it does not at all follow that it can be open to any one, after the death of the wife, to say, not that she had judicially acquired the right to live separate from her husband, but that facts existed which would have enabled her to obtain a decree giving her that right, or preventing the husband from insisting on her return. It would be very dangerous to open the door to any such discussions ; and, as was forcibly put in argument at the bar, if the principle were once admitted it could not stop at cases of adultery. For, if the husband, before the separation, had been guilty of cruelty towards the wife, that, no less than adultery, might have been pleaded in bar to a suit for restitution of conjugal rights. It is obvious, that to admit questions of this sort to remain unlitigated during the life of the wife, and to be brought into legal discussion after her death for the purpose only of regulating the succession to her personal estate, would be to the last degree inconvenient and improper."

Lord Campbell, the Lord Chancellor, agreed with the above view, saying (1) : " The first marriage in 1822 remained in full force : there was no dissolution of that marriage, nor any judicial séparation de corps, as the French call it ; there was no such separation as would even amount to a divorce a mensa et thoro. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicile separate from that of her husband." The other learned Lords concurred, Lord Kingsdown even expressing a doubt as to the power of a wife to acquire a separate domicil after a judicial separation.

The above decision, which was followed in *Yelverton* v. *Yelverton* (2), appears to me to conclude this case ; but doubt has been caused by some further observations added by Lord Cranworth in the same speech (3) : " I have already observed,"

(1) 7 H. L. C. 423. (2) (1859) 1 Sw. & Tr. 574.
(3) 7 H. L. C. 418.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Viscount Cave.

he said, "that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add, that there may be exceptional cases to which, even without judicial separation, the general rule wou'd not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be, that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show, that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say, that in the appeal now before the House no such case of exception is to be found." The above observations were cited with approval by Sir R. Phillimore in *Le Sueur* v. *Le Sueur* (1) and were again referred to by Swinfen Eady J. in *In re Mackenzie* (2); and they formed the basis of the judgment of the Lord Ordinary in this case. I am disposed to think that the argument based upon Lord Cranworth's dictum—which was general and tentative in form—has been carried too far. Lord Cranworth can hardly have intended to suggest that in every case where a husband deserts his wife and settles abroad the wife retains her former domicil; for such a suggestion would be inconsistent with his own earlier reasoning quoted above and with the actual decision in *Dolphin* v. *Robins*. (3) Possibly he had in mind the case of a husband who, having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicil; and there is no doubt authority (which it is not now necessary to examine) for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights: see *Pitt* v. *Pitt* (4); *Redding* v. *Redding* (5); *Armytage* v. *Armytage* (6); and *Ogden* v. *Ogden*. (7)

(1) 1 P. D. 139.
(2) [1911] 1 Ch. 578.
(3) 7 H. L. C. 390.
(4) (1864) 4 Macq. 627, 640, 647.
(5) 15 R. 1102.
(6) [1898] P. 178, 185.
(7) [1908] P. 46, 78.

But if so, the proposition can have no bearing upon the present case, where the husband emigrated with his wife's consent and before any matrimonial offence had been committed, and where it is not the guilty husband but the representative of the wife who insists that her domicil followed his.

In my opinion, therefore, the argument for the appellant fails, and the decision of the Court of Session is right and should be affirmed.

LORD DUNEDIN (read by LORD SHAW OF DUNFERMLINE). My Lords, all the learned judges of the Court of Session came to the conclusion that Mackinnon at the time of Mrs. Mackinnon's death had acquired a domicil in Queensland. From this conclusion I am not prepared to differ. It is a question of fact, and I am satisfied that their Lordships approached that question of fact in full recognition of the onus lying upon any one who asserts that a domicil of origin has been abandoned; a doctrine laid down in many cases, and particularly by this House in the cases of *Cunliffe Brooks* (1) and *Winans*. (2) Now that the domicil of the wife is that of the husband, and follows any change which he makes, even though she is not de facto resident with him, is acknowledged law and not controverted by the appellant. His only argument is that there is an exception to this general rule when the circumstances are such that a wife, had she chosen, would have been entitled to divorce or at least to judicial separation. The actual case of divorce need not be considered for if there is divorce the foundation of the rule is gone. She has no longer a husband and she could not therefore be bound by the changes of domicil of a person to whom she is connected by no family tie.

The sheet anchor of the appellant's argument is a certain dictum of Lord Cranworth in the case of *Dolphin* v. *Robins*. (3) In that case, Mrs. Dolphin, the wife of a domiciled Englishman, had obtained a decree of divorce in the Scottish Courts on the ground of adultery against her husband who, at that time,

(1) [1906] A. C. 56; 8 F. (H. L.) 4. (2) [1904] A. C. 287.
(3) 7 H. L. C. 390.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Lord Dunedin.

was temporarily resident in Scotland. She had then gone to France where she had gone through the ceremony of marriage with a Frenchman. The question in the case was whether Mrs. Dolphin on her death was, by domicil, an Englishwoman or a Frenchwoman. This House first decided that the Scottish decree of divorce was null for want of jurisdiction, no Courts having a power to divorce a vinculo except the Courts of the country of the domiciled husband, a view followed long after in the case of *Le Mesurier* (1); and then put the question for argument, "whether the circumstances are such as to render the wife capable of gaining for herself a domicile, and if so, did she do it?" The noble and learned Lords unanimously held that, the null decree of divorce being in no sense equivalent to a decree of separation, Mrs. Dolphin remained a married woman not separated from her husband by judicial decree, and therefore incapable of acquiring a different domicil from that of her husband.

My Lords, I confess I think that decision rules this case, and with great deference to Lord Cranworth I cannot hold his remarks as free from the criticism of self-contradiction. Having indicated a doubt as to whether, if there was a decree of judicial separation, the wife might not have acquired a domicil different from that of her husband—nay, having almost expressed his preference for the view that she might, he proceeds as follows (2): "On this question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce a mensa et thoro, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out, that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that, without such a decree, it must be considered that the marital rights remain unimpaired." He then goes on to say, and it is on these words that the appellants found: "Before quitting the

(1) [1895] A. C. 517. (2) 7 H. L. C. 417, 418.

subject, I should add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported." My Lords, I cannot reconcile these words with the plain sentence "without such a decree the marital rights remain unimpaired." Lord Kingsdown has carefully withheld his assent to the idea that even a judicial separation would be sufficient. He does not give a decisive opinion, and I think, considering the importance of the subject, it will be well that we should follow his example, and wait till the circumstance arises. It is true that in *Le Sueur* (1) Sir R. Phillimore puts into effect the suggestion of Lord Cranworth. Against that may be put the decision of Sir Cresswell Cresswell in *Yelverton* v. *Yelverton* (2) where he said: "The domicil of the husband is the domicil of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicil for herself." He adds: "As was recently held by the House of Lords in *Dolphin* v. *Robins*" (3), which shows that the learned judge took the same view of that case as I do. The practical consequences of the other view would be, I think, extremely inconvenient. In the present case, it is left in doubt at what precise date the husband acquired his Australian domicil. It may well have been before the adultery was committed. Assuming it was so, it seems impossible to suppose that a supervening adultery would alter the wife's domicil. There would therefore have to be inquiry as to the precise date. In other cases there may be allegations of adultery of dubious proof; and finally, as was ingeniously, but I think soundly, argued by Mr. Moncrieff, if the wife under this doctrine is entitled to assert a different domicil from that of her husband, it would induce great difficulty in carrying out the views in *Le Mesurier's Case* (4), for, if either

(1) 1 P. D. 139.
(2) 1 Sw. & Tr. 574, 584.
(3) 7 H. L. C. 390.
(4) [1895] A. C. 517.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Lord Dunedin.

spouse wished a divorce a vinculo, which would be the Court which would be empowered to grant it ?

My Lords, I think the only safe course is to keep close to the well-established rule that the domicil of a husband and wife, undivorced and unseparated, is one and the same, and I am therefore of opinion that this appeal fails.

LORD SHAW OF DUNFERMLINE. My Lords, a demand has been made by the Commissioners of Inland Revenue upon the trustees of the late Mrs. Mackinnon for the payment of legacy duty, residue duty, and a certain proportion of succession duty. The foundation of the claim of the Crown is that these payments are due out of Mrs. Mackinnon's estate, in respect that she died domiciled in Scotland. If the foundation—as to domicil—fails, the case of the Crown disappears.

Mrs. Mackinnon was married in 1878, her husband being a Scotchman. For some time prior to 1893 the husband and wife lived in Aberdeen. Four children were born of the marriage but they all pre-deceased their mother without issue. Robert Mackinnon became addicted to heavy drinking, and it was arranged that he should go abroad. He did so in the year mentioned—i.e., 1893—and he went to Australia ; there he remained for a short time in New South Wales. Thereafter he lived in Queensland from at least 1902 till his death in 1918. On July 2 of the year 1902 he went through a bigamous form of marriage with a woman named Bennett with whom he lived for sixteen years until his death. He continued to draw a small naval pension which he had from the home authorities but beyond that he retained no connection with the home country. He never communicated with his wife. Upon these facts and upon other details brought out in evidence, I have no hesitation in agreeing with the judgments of the Court below, and in holding it to be proved that Mackinnon's domicil was in Queensland.

It is perfectly true that his domicil of origin was Scotch. It is also perfectly true that facts must be clear and unambiguous before it can be concluded that a domicil of origin

has been permanently changed. A long residence abroad is not sufficient to change it. Yet the question still remains in all such cases, Did the citizen leave this country and betake himself to another for good; did he betake himself to, or remain in, his new abode sine animo revertendi?

After all, that is a question of fact; and I cannot bring myself to hold that Mackinnon ever had any intention of again becoming a Scotch citizen. He formed a home in Queensland; he worked there, and such interests as he had in life were all there. With the exception of drawing his pension, he definitely cut every link binding him to his home in his native country, and he showed no sign whatsoever of returning. It was argued, however, that when he contracted a bigamous marriage he interfered with his own freedom in returning to or even in communicating with, his domicil of origin. Probably he did, but I see no ground for thinking that he did so against his will or that a Court is entitled to conclude that his true intentions as to domicil are to be assumed to have been that he meant to return but could not. Such views are too astute to be practical. The man's intentions are best judged by his habits and his acts if he has never given any other expression or signification to them, and in my view his habits and his acts squared with his intention, which was to settle permanently in Australia. The first question in the case—i.e., as to Robert Mackinnon's domicil—is thus, therefore, settled. He was domiciled in Queensland.

The second question is whether, the husband being thus domiciled in Queensland, his wife remained domiciled in Scotland. I do not doubt that she did not. If she did, the case would form a notable and unique exception from what in my opinion is a sound, reasonable and long-settled principle of law. Assuming accordingly that Mackinnon went out to Australia in the circumstances mentioned, cutting, as I have said, the ties with Scotland completely, and becoming domiciled in Australia, then I am of opinion that the case is a clear one for the application of the ordinary principle to which I have referred. The wife continued to have the domicil of a married

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Lord Shaw of Dunfermline.

woman, a derivative domicil, the domicil of her husband. When that changed, the derivative result changed, the wife's domicil was changed from Scotch to Australian.

Any doubts, my Lords, that there are in the case, have arisen in the legal sphere; but, even there, they have not arisen on account of the application of any well-known doctrines in law but substantially upon a conjecture by way of reserve, for I call it so—a conjecture by way of reserve—expressed by Lord Cranworth in the case of *Dolphin* v. *Robins*. (1) That conjecture has been repeated and repeated, in text-books and succeeding cases. No case which crystallizes it in fact has ever yet arisen in which any exception to or aversion from the general doctrine of domicil has been given effect to.

My Lords, to begin with, I am clearly of opinion that the present case is certainly not one to which any such conjectural exception could apply. I entirely agree with what has been said by my noble and learned friend, Lord Dunedin, with regard to Lord Cranworth's observations in *Dolphin*. But I may be permitted to put the leading citations in this order. Lord Cranworth says (2): "In the case of a wife, the policy of the law interferes, and declares that her home is necessarily the home of her husband; at least it is so prima facie. But where, by judicial sentence, the husband has lost the right to compel the wife to live with him, and the wife can no longer insist on his receiving her to partake of his bed and board, the argument which goes to assert that she cannot set up a home of her own, and so establish a domicile different from that of her husband, is not to my mind altogether satisfactory. The power to do so interferes with no marital right during the marriage, except that which she has lost by the divorce a mensa et thoro. She must establish a home for herself, in point of fact; and the only question is, supposing that home to be one where the laws of succession to personal property are different from those prevailing at the home of her husband, which law, in case of her death, is to prevail? Who, when the marriage is dissolved by death, is to succeed to her personal

(1) 7 H. L. C. 390. (2) Ibid. 416.

estate; those entitled by the law of the place where, in fact, she was established, or those where her husband was established? On this question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce a mensa et thoro, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion, that, without such a decree, it must be considered that the marital rights remain unimpaired."

My Lords, to pause there, the judgment applies directly to the present case. This case is one, so to speak, of a domicil of succession, and it is one in which Mrs. Mackinnon had obtained no decree of judicial separation. Under these circumstances it would appear to have been somewhat unnecessary to have gone on to consider the conjectural case—for the learned Lord has declared that the marital rights were to be unimpaired without such a decree—the case of circumstances where there was no such decree, and yet curiously enough such an impairment. The passage to which I refer is as follows (1): "I have already observed, that the decision in this case will be no precedent where there has been a decree for judicial separation; and, before quitting the subject, I should add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported. It may be that in these and similar instances the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show that the able argument of Sir Hugh Cairns has not been lost sight of. It is sufficient to say, that in the appeal now before

(1) 7 H. L. C. 418.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Lord Shaw of Dunfermline.

the House no such case of exception is to be found." This passage put Lord Kingsdown on his guard at once, and he declared as follows(1): "One thing only I am anxious to guard against. If any expressions of my noble and learned friend have been supposed to lead to the conclusion that his impression was in favour of the power of the wife to acquire a foreign domicil after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House."

Lord Campbell (Lord Chancellor) expressed his view as follows(2): "The first marriage in 1822 remained in full force: there was no dissolution of that marriage, nor any judicial separation de corps, as the French call it; there was no such separation as would even amount to a divorce a mensa et thoro. I am quite clear, therefore, that this lady was not in a situation to acquire a new domicil separate from that of her husband. Upon the other question to which my noble and learned friend has referred, I abstain from giving any opinion. It is quite clear that the mere consent of the husband that she should live elsewhere, would confer no right upon her to acquire a foreign domicil."

My Lords, I have ventured to insert in my address these quotations, for this particular purpose. I must not myself be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion, very doubtfully named domicilium matrimonii. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental—namely, that that unity which the marriage signifies is regulated by one domicil and one domicil alone—i.e., that of the husband. I am quite sure that Lord Watson in *Le Mesurier* (3) treated the matrimonial domicil as the real domicil and nothing but the real domicil, but considered that as the real domicil of one person—namely, the husband. Much confusion may be

(1) 7 H. L. C. 420. (2) Ibid. 423.
(3) [1895] A. C. 517.

caused by the introduction of the idea of there being two domicils of the marriage or two domicils of succession while the marriage tie continues.

I desire further to say that I think that in this connection too little regard has been paid to the judgment of this House in *Warrender* v. *Warrender*. (1) The case was powerfully argued by Sir J. Campbell, Attorney-General, on the one side, and Sir William Follett on the other; and the point with which I am dealing was a matter of direct controversy. Sir J. Campbell's argument was (2): "The application of the legal fiction, which makes the husband's house the legal and proper domicil of the wife, is excluded in this case by the deed of separation."

This was strongly countered by Lord Brougham, who thus deals with the point (3): "It is admitted on all hands that, in the ordinary case, the husband's domicil is the wife's also. . . . . Actual residence—residence in point of fact—signifies nothing in the case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. . . . . Had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be—with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case?" His Lordship then proceeds to discuss whether the agreement founded on in the case was sufficient for its purposes and finds that there is a fundamental difficulty in so holding.

But the Lord Chancellor did not leave the matter there: he adds this sentence (4): "But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it

(1) 2 Cl. & F. 488.
(2) Ibid. 498.
(3) Ibid. 523.
(4) Ibid. 526.

H. L. (Sc.) 1920 LORD ADVOCATE v. JAFFREY. Lord Shaw of Dunfermline.

had been ever so formal, and ever so full in its provisions, which can by law displace the presumption of domicil raised by the marriage, and subsisting in full force as long as the marriage endures." So far Lord Brougham in *Warrender* v. *Warrender*. I do not find that this, stated as a general principle, has ever been departed from. Smaller inconveniences may of course be remedied and a jurisdiction assumed almost ex necessitate to find a remedy for these inconveniences on the spot: but in the great fundamental issues of status and succession the domicil of the wife is the domicil of the husband until divorce a vinculo matrimonii has been obtained.

This view humbly appears to me to be in entire accord with that of Lord Watson when in *Le Mesurier* (1), and dealing with the case of *Niboyet* (2) and the appeal made to the remedial provisions of the English Statute of 1857, his Lordship observed: "It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage." His Lordship refers to a so-called "matrimonial domicil," having quoted with manifest approval the judgment of Lord Deas in the Scotch case of *Jack* v. *Jack* (3), where that distinguished judge observed: "Neither can I solve this case by what has been sometimes called the domicil of the marriage. The phraseology appears to me to be rather calculated to mislead. It is figurative, and wants judicial precision. There is no third domicile involved, apart from the domicile of the husband and the domicile of the wife. Domicile belongs exclusively to persons. Having ascertained the domicile of the husband and the domicile of the wife, the inquiry into domicile is exhausted." After an exhaustive summary of the cases both in England and in Scotland, Lord Watson in *Le Mesurier* (4) concludes: "When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either

(1) [1895] A. C. 531.
(2) (1878) 4 P. D. 1.
(3) (1862) 24 D. 467, 473.
(4) [1895] A. C. 536.

of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage." It appears to me, my Lords, to be a question which has certainly never been settled in the affirmative whether even a judicial decree of separation can affect the domicil of the spouses, permitting thereafter separate domicils to be acquired. The ordinary rule has not yet been so invaded. It works conveniently. It prevents confusion. It regulates succession by one set of rules instead of possibly by two, and it preserves that unity of idea and fact with regard to the domicil of married parties which has hitherto always been upheld by law.

I should desire further to observe that I should have the greatest doubt, in any event, whether, if one of the spouses fails during the continuance of the marriage to obtain a divorce a vinculo matrimonii, it is legitimate to raise the question after the death of the other. A fortiori, my Lords, I think this to be also the case when the question is raised after the death of the spouses as in the present case, in order to promote or regulate ulterior interests. I agree that the appeal fails.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 16, 1920.

Agent for the appellant: *H. Bertram Cox, Solicitor for England of the Board of Inland Revenue, for Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agents for the respondents: *Botterell & Roche, for Morice & Wilson, Advocates, Aberdeen, and Macpherson & Mackay, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1920 July 22.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY . . . . } APPELLANTS;

AND

NEW ZEALAND AND AUSTRALIAN LAND COMPANY, LIMITED . . . } RESPONDENTS.

Revenue—Income Tax—Colonial Tax—Repayment—Preference Shares—Proper Deduction from Dividends—Right to benefit by Repayment—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 54—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 43.

By s. 43 of the Finance Act, 1916, if any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income at a rate exceeding 3*s.* 6*d.* proves to the satisfaction of the Special Commissioners that he has also paid any colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of 3*s.* 6*d.*

A Scottish company incorporated under the Companies Acts and carrying on business in the United Kingdom and in the Colonies, having paid United Kingdom income tax at the current rate of 5*s.* per £, proved that it had paid Colonial income tax at the rate of 1*s.* 6*d.* per £ on that part of its income which was earned in the Colonies and obtained repayment in respect of its Colonial profits of a corresponding amount of United Kingdom income tax:—

Held, that the company, in paying the dividend for the then current year on its preference stock, was entitled to deduct from that dividend United Kingdom income tax at the rate of 5*s.* per £, and was not bound or entitled to deduct at the net rate to be ascertained by taking into account the amount of the tax repaid to the company under s. 43 of the Finance Act, 1916.

Rover v. *South African Breweries* [1918] 2 Ch. 233 overruled.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland upon a special case.

The respondent company was incorporated under the Companies Acts, and had its registered office in Scotland. It

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

carried on business in the United Kingdom, and also carried on a large business as pasturalists and agriculturists in New Zealand and Australia. At the year ending March 31, 1917, its capital was 2,500,000*l.* divided into 1,000,000*l.* "A" preference stock and 1,500,000*l.* ordinary stock. The appellant company held 10,000*l.* of the preference stock of the respondent company.

By the articles of association of the respondent company (clause 10): "Every holder of 'A' preference shares or stock shall be entitled to receive in each year a dividend upon such shares or stock, after the rate of four pounds per cent. per annum (and no more) out of the profits of each year" in preference to all other share or stockholders in the company.

The respondent company was assessed for and paid income tax in New Zealand and Australia as well as in the United Kingdom.

The Colonial income tax paid by the company consisted of (1.) income tax paid in the Dominion of New Zealand; (2.) State income tax paid in each of the States of New South Wales, Queensland and Western Australia; and (3.) Federal income tax paid in the Commonwealth of Australia. Colonial income tax was paid by the company in the respective colonies on the profits earned by it there. These profits were arrived at after meeting the working expenses of the company in the said colonies. The balance of the said profits, after deducting the Colonial income tax paid, was remitted to the United Kingdom, and carried to the credit of the general revenue account of the company. The balance of revenue, after meeting revenue charges and expenses of the company in the United Kingdom, was carried to profit and loss account in the usual way and constituted part of the profits of the company upon which United Kingdom income tax was chargeable, and which, subject to payment thereof, were available for distribution amongst the stockholders of the company or otherwise. For the year beginning April 6, 1916, United Kingdom income tax was chargeable at the rate of 5*s.* in the £. The profits or gains of the respondent company for that year were assessed at 418,161*l.* and United Kingdom

H. L. (Sc.) 1920

SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

income tax at the rate of 5*s.* per £ amounting to 106,540*l.* 5*s.* was charged thereon and was paid by the company. At its annual general meeting, held on November 20, 1917, the respondent company sanctioned the payment of the dividend of 4 per cent. on the "A" preference stock, under deduction of income tax, and the payment of a dividend of 10 per cent. and a bonus of 5 per cent. free of income tax on the ordinary stock, for the financial year ending March 31, 1917.

On making payment of the dividend of 4 per cent. to its preference shareholders, including the appellant company, the respondent company deducted income tax at the rate of 5*s.* per £.

By s. 43 of the Finance Act, 1916: "If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income-tax year on any part of his income at a rate exceeding three shillings and sixpence proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of three shillings and sixpence, or, if that difference exceeds the amount of tax on that part of his income at the rate of the Colonial income tax, equal to that amount.

"In this section the expression 'United Kingdom income tax' means income tax charged under the Income Tax Acts; and the expression 'Colonial income tax' means income tax charged under any law in force in any British possession or any tax so charged which appears to the Special Commissioners to correspond to United Kingdom income tax."

The respondent company, having paid United Kingdom income tax for the year in question, satisfied the Special Commissioners that Colonial income tax at the rate of at least 1*s.* 6*d.* per £ had been paid in respect of part of the income earned in the Colonies. Accordingly the company claimed repayment, in respect of the profits earned by it in the Colonies,

of part of the United Kingdom income tax equal to the difference between the amount so paid—namely, 5*s.* per £, and the amount it would have paid if the United Kingdom income tax had been charged at the rate of 3*s.* 6*d.* per £—i.e., a difference of 1*s.* 6*d.* per £. The Commissioners admitted the claim and repaid to the respondent company the sum of 28,435*l.* 17*s.* 6*d.*

The appellant company maintained that the respondent company in paying to the appellant company the dividend of 4 per cent. on its preference stock was only entitled to deduct t e net rate of United Kingdom income tax which had in fact been charged on and paid by the respondent company after taking into account the repayment of part of the said tax made to it under s. 43 of the Finance Act, 1916.

The question of law for the determination of the Court of Session was whether, in paying the dividend of 4 per cent. for the year ending March 31, 1917, to the appellant company on its holding of preference stock in the respondent company, the respondent company was entitled to deduct from the said dividend United Kingdom Income Tax (*a*) at the rate of 5*s.* per £, or (*b*) at the net rate to be ascertained by taking into account the amount of the said tax repaid to the respondent company under s. 43 of the Finance Act, 1916.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie) answered the first alternative in the affirmative and the second alternative in the negative.

1920. June 28, 29. *Alexander Moncrieff K.C.* (with him *H. P. Macmillan K.C.* and *A. C. Black*) (all of the Scottish Bar) for the appellants. The question is for whose benefit was the 1*s.* 6*d.* recovered? Under the system of deduction at the source authorized by s. 54 of the Income Tax Act, 1842, a company pays income tax on behalf of all its shareholders, preference as well as ordinary. It is true that the revenue collects from the company at the source but the income which is taxed is really the aggregate income of the shareholders. The shareholders pay the tax and the company

H. L. (Sc.) 1920 SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

is only the medium of payment. Since the company pays as agent for all the corporators it follows that whatever it recovers in the form of abatement of United Kingdom income tax must be communicated to the same persons. The only allowance by way of deduction from dividend to which a shareholder is bound by statute to submit is an allowance of what has in fact been paid on his account in respect of United Kingdom income tax and not of a sum which the company has not in fact paid. The respondent company has not in fact paid United Kingdom income tax on its profits brought into charge at the rate of 5*s.* per £, but only at the rate of 3*s.* 6*d.* per £, for there is no difference in law between paying 5*s.* and recovering 1*s.* 6*d.* part of the 5*s.* and paying 3*s.* 6*d.* once and for all. The respondent company in deducting tax at a higher rate than it actually pays is in reality paying to the preference stockholders less than the declared dividend of 4 per cent. This case is covered by *Rover* v. *South African Breweries* (1), which was rightly decided.

Condie Sandeman K.C. (of the Scottish Bar) and *Austen-Cartmell* (of the English Bar) (with them *Douglas Jamieson* of the Scottish Bar) for the respondents. The respondent company as a company is alone in the position of having fulfilled the conditions which entitle a person to repayment of United Kingdom income tax under s. 43 of the Act of 1916. The preference stock holders who have paid income tax neither in the United Kingdom nor in the Colonies in respect of their dividends have no title to demand the repayment provided by that section. In claiming this repayment the respondents were exercising a right personal to them as a company and in no sense were they acting as agents for the appellants, who had no title or interest to make the demand. The payment of Colonial income tax was a disbursement by the respondent company in the Colonies before remitting its colonial revenue to the United Kingdom. With that the preference stockholders were in no way concerned and the payment to them of the dividend of 4 per cent., to which alone they were entitled,

(1) [1918] 2 Ch. 233.

was in no way affected thereby. The respondent company paid Colonial income tax at the rate of at least 1*s.* 6*d.* per £, and also United Kingdom income tax at the rate of 5*s.* per £. It had thus, on part of its income, paid in the name of income tax 6*s.* 6*d.* per £. The effect of the repayment was to reduce the amount disbursed by the company for income tax to 5*s.* per £, the rate of United Kingdom income tax for the year in question. It is a fallacy to say that the respondent company has paid United Kingdom income tax at the rate of 3*s.* 6*d.* per £ only. The object and intention of s. 43 was to afford relief to those who would otherwise have had to bear the double burden of home and colonial taxation on the same income, and not to diminish the charge upon a class of persons who had not borne that double burden. Here the Colonial income tax has been paid not by the preference stockholders but by the respondent company and it has been paid out of profits which would have fallen to be applied to the ordinary stockholders alone after the dividend on the preference stock had been satisfied. The deduction of United Kingdom income tax at a lesser rate than 5*s.* per £ would have resulted in the appellant company's being paid a dividend in excess of 4 per cent. contrary to the articles of association of the respondent company.

Alex. Moncrieff K.C. replied.

The House took time for consideration.

1920. July 22. VISCOUNT HALDANE (read by VISCOUNT CAVE). My Lords, I have arrived without difficulty at the conclusion that the decision of the Second Division was right. It is important to be clear as to the exact nature of the question decided by that tribunal.

The question raised by the Special Case was whether, the full dividend of 4 per cent., to which, and to no more than which, the appellants as holders of preference shares in the respondent company were entitled, having been paid in full, the respondents were entitled to deduct the whole amount of 5*s.* in the £ as income tax for which they

H. L. (Sc.) 1920

SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

Viscount Haldane.

were said to be accountable under the Finance Act, 1916, to the Inland Revenue Authority of the United Kingdom; or whether the appellants were entitled, in respect of the preference shares on which the whole of the possible dividend to which they were entitled had been paid, to a deduction or return to them, as between themselves and the respondent company and its ordinary shareholders, of the amount allowed by s. 43 of that Act, an amount which I may for convenience treat as being 1*s.* 6*d.* out of the 5*s.* Sect. 43 is in these terms: [His Lordship read the section.] The respondent company carried on a large part of its business in New Zealand and Australia. It earned profits there on which Colonial income taxes were charged. The amounts of these Colonial taxes were deducted by the respondent company, just as were general expenses, and what remained as nett balance was remitted to Scotland, where the respondent company was domiciled, to be divided as profit, earned along with other profit coming into general revenue account. There is no doubt about the liability of the respondent company to United Kingdom income tax in respect of these profits, nor is there any doubt about their right to claim a repayment of allowance under the terms of s. 43, which I have quoted. The question which arises is whether the preference shareholders, having received their dividends in full, are entitled to claim against the respondent company, and as between themselves and the company to participate in, the allowance made by the United Kingdom authorities to the latter under s. 43, in respect of the Colonial taxes which had to be paid in New Zealand and Australia before the nett profits earned there could be ascertained and sent to Scotland. Other questions might conceivably emerge if the preference shareholders had not received the full amount to which by their contract they were entitled. But as they have received all that they could possibly claim under that contract, the only question that does arise is whether they are entitled as between themselves and the respondent company to any allowance under s. 43.

My Lords, the answer to this question depends on the

language of the section. It will be observed that the words used confer a right to claim only on a person who can show that he has paid Colonial income tax on the part of his income on which he is taxed in the United Kingdom. Speaking for myself, I am wholly unable to understand how the appellants can be truly said themselves to have paid Colonial income tax on their preference dividends. They have received these dividends in full. No doubt the respondent company paid Colonial income tax on the profits out of the residue of which the preference dividends have been paid. But that did not diminish the income of the appellants. They neither paid the tax themselves, nor were indirectly subjected to it in any way. It is the ordinary shareholders alone who have lost by it, and in a question between the various bodies of shareholders and the respondent company as to how the latter, who actually paid the tax, are to account for the amount allowed them over here for having paid it, I think that as against the ordinary shareholders the appellants have no title. Neither under the language of s. 43, nor indirectly, does it seem to me possible for them to substantiate a claim based on the words employed by the Legislature. The appellants as preference shareholders are outside the legislative jurisdiction of the Dominions, and are not taxed there. It is true that profits carried by the respondent company are within that jurisdiction, and are taxed. But the only income to which the appellants are entitled in respect of their preference shares has been left undiminished. It is taxed here only. So is taxed here the income of the respondent company out of which it is derived. But under the machinery of the Income Tax Acts the amount of the tax is exacted only once. The appellants have to bear the ultimate burden of the 5*s.*, and they can claim no allowance under s. 43; because they have paid nothing, either directly or indirectly, in respect of which they can claim. Some one else paid, and that other person, the respondent corporation, has kept the appellants clear of all deduction from their income on that account.

My Lords, the opinion which I have thus expressed is not

H. L. (Sc.) 1920

SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

consistent with the conclusion arrived at by Astbury J. in *Rover* v. *South African Breweries*. (1) But after giving attentive consideration to the reasoning of the learned judge in that case, I am unable to satisfy myself with his construction of s. 43, or to follow him in his conclusion. I am therefore of opinion that the decision of the Court of Session in the case before us must prevail and should be affirmed.

VISCOUNT FINLAY. My Lords, the appellants, the Insurance Company, are the holders of 10,000*l.* preference stock in the capital of the respondents, the Land Company. The Land Company carry on business in the United Kingdom and also in New Zealand and Australia. It is assessed to income tax in New Zealand and Australia on the profits made there, as well as in the United Kingdom. Sect. 43 of the Finance Act, 1916, makes provision for repayment of a portion of the United Kingdom income tax to the person who has paid if he proves that he has paid Colonial income tax in respect of the same part of his income. The question in the present case is this : Does the sum so repaid in respect of the preference stock form part of the assets of the Land Company, or are the preference stockholders entitled to it ? The section upon which the case turns (6 & 7 Geo. 5, c. 24, s. 43) is as follows: [His Lordship read the section.]

The Land Company paid Colonial income tax, in the Dominion of New Zealand, in each of the States of New South Wales, Queensland and Western Australia, and in the Commonwealth of Australia. These taxes were paid on the profits earned in New Zealand, the respective States and the Commonwealth respectively. The balance of the profits, after paying these Colonial taxes, was remitted to the United Kingdom and formed part of the profits of the company on which United Kingdom income tax was charged. These profits were assessed for the year in question at 418,161*l.*, and United Kingdom income tax at the rate of 5*s.* in the £ thereon, amounting to 106,540*l.* 5*s.*, was charged upon and paid by the Land Company. The Land Company claimed

(1) [1918] 2 Ch. 233.

repayment under the section above quoted of a part of the United Kingdom income tax, equal to the difference between the amount so paid at 5*s.* in the £ and the amount that would have been paid if the tax had stood at 3*s.* 6*d.* in the £. They satisfied the Commissioners that Colonial income tax had been paid at the rate of at least 1*s.* 6*d.* in the £ in respect of the income earned in New Zealand and Australia. The Commissioners admitted the claim and repaid to the Land Company 28,435*l.* 17*s.* 6*d.* By the Articles of Association the holders of the preference stock are entitled to a dividend at the rate of 4 per cent., and no more, cumulative. Such a dividend was declared in November, 1917. In making the payment, the Land Company deducted therefrom the United Kingdom income tax at the rate of 5*s.* per £, assessed on and paid by the company. The Insurance Company, as holders of preference stock, claim that the sum so deducted ought to have been reduced by the amount received by the Land Company from the Commissioners under s. 43 in respect of the Insurance Company's preference stock. In other words, they claim that the preference stockholders, and not the company as a whole, are entitled to the benefit of the amount returned under s. 43, so far as it related to the preference stock.

The terms of s. 43 appear to me to be decisive against this claim. The person, and the only person, who can claim the repayment under that section is defined by the initial words of the section: "If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income-tax year on any part of his income proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment, etc." It is the company, and the company alone, who fulfil this requirement. It is the company who paid the Colonial tax and the United Kingdom tax. The preference stockholders have paid by deduction the United Kingdom tax, but they did not pay the Colonial tax. The Colonial tax was paid by the company, and by it only. It cannot be contended that in

H. L. (Sc.) 1920 SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO. Viscount Finlay.

paying the Colonial tax the company acted as agents for the preference stockholders. The Colonial income tax had to be paid in the Colony and the profits could not be remitted to the United Kingdom without paying it. It stands exactly on the same footing with any expenses necessarily incurred in the business of the company in the Colonies. The company, in the conduct of its business, acts as a legal person, as a corporation. The different classes of holders of stocks and shares are entitled to share in the profits in terms of the articles, but the company carries on its business itself as the principal. As such, it has paid the Colonial taxes and the United Kingdom income tax, and it is the only person entitled to claim and to receive from the Commissioners the repayment provided for by s. 43.

This view of the case is that on which the Second Division proceeded. It is not a mere technicality, but proceeds upon the reality of the transaction and gives effect to the rights of the parties. Payment of the Colonial income tax was part of the expense of carrying on the business in Australia or New Zealand, and the profits were necessarily diminished by the amount so paid just as by any business expenses incurred in ordinary course. If this Colonial tax had not existed, so much more would have been available as profits from the business in the Colonies for division among the shareholders of the company. The preference stockholders were entitled to their 4 per cent., and to nothing else. This 4 per cent. they have received subject, of course, to the deduction for the United Kingdom income tax. The claim now put forward is a claim to something beyond the 4 per cent. The preference shareholders in effect demand that the sum repaid in relief of the general assets of the company which bore the Colonial taxes should be handed over to them in addition to their 4 per cent. dividend. I can see no real foundation for this claim, either in law or on the merits. The sums repaid by the Commissioners go into the assets of the company, and will fall into the dividend payable to the ordinary shareholders, whose dividends would otherwise have been diminished by the whole amount of the disbursements

for the Colonial income tax. It is on the ordinary shareholders that the burden of this Colonial tax, as of all other business expenses, falls, and any relief by repayment in respect of it ought, in all fairness, to go into the funds of the company, and so inure for the benefit of those who bore the burden. The preference shareholders are not entitled to anything out of the funds of the company after the 4 per cent. has been paid. The funds of the company must, of course, be applied in the first instance towards paying the interest due on the preference stock. If, by any catastrophe, there were not enough to pay the stipulated preferential dividend without recourse to the sums repaid by the Commissioners under s. 43, these sums would, like any other assets of the company, have to be applied for this purpose. But so long as the business of the company goes on in the ordinary course, the holders of the preference stock have no claim to it.

The case of *Rover* v. *South African Breweries* (1) was cited to your Lordships. In that case Astbury J. gave a decision in favour of the preference shareholder on the very point which is now under consideration in this appeal. The main ground on which that decision was rested was that the company were only entitled to charge against the preferential shareholder, by way of deduction, the sum which they had actually paid for United Kingdom income tax, and that where there is a repayment of a portion of the sum paid it comes to the same thing as if, in the first instance, a reduced sum had been paid. So, of course, it does as regards the effect of the transaction on the pocket of the person paying. But it by no means follows that because such a repayment has been made under s. 43 the case can be dealt with on the assumption that what takes place is equivalent to a reduction of the United Kingdom income tax by the amount returned. The wording of the section shows that this is not what was meant. It is only a person who has paid the United Kingdom income tax that is entitled to apply for the repayment in respect of Colonial taxes which have been paid on the same portion of income. In the present

(1) [1918] 2 Ch. 233.

H. L. (Sc.) 1920

SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

Viscount Finlay.

case it was only as a person who had paid the United Kingdom income tax that the company became entitled to claim the repayment on proving that the company had also paid the Colonial tax in respect of the same portion of income. The company has, in fact, paid the United Kingdom income tax, and it is the company that is entitled to the repayment received. To treat the payment as diminishing the amount deductible in respect of United Kingdom income tax from the preferential dividend of 4 per cent. is to hand over the repayment to the preferential stockholder, who has clearly no claim to it. I think the decision in *Rover's Case* was erroneous. In that case it appears to me that the considerations adverted to in the earlier part of this judgment, which show that the preferential stockholder cannot be entitled to this repayment, were overlooked. The decision proceeded simply on the assumption that the repayment had the effect of diminishing pro tanto the United Kingdom income tax.

In my opinion this appeal should be dismissed with costs.

VISCOUNT CAVE. My Lords, the argument for the appellant ultimately took the following form : Under s. 54 of the Income Tax Act, 1842, the company can only deduct from the preferential dividend a proportionate part of the British income tax with which it has been "charged." No doubt it was originally charged with tax at the rate of 5*s.* in the £ ; but of this tax 1*s.* 6*d.* in the £ has been repaid to the company under s. 43 of the Finance Act, 1916. Therefore the difference only, or 3*s.* 6*d.* in the £, is the sum ultimately "charged" upon the company, and is therefore the only sum which the company is entitled under s. 54 of the earlier Act to deduct from the preferential dividend.

It was pointed out in the course of the argument that such a construction of the statute would lead to results which cannot possibly have been intended. The purpose of s. 43 is to give some relief to the taxpayer who has paid both British and Colonial income tax upon the same income. Here the double tax has been borne by the ordinary shareholders,

and no part of it has fallen upon the preference shareholders; and yet it is said that the latter and not the former are entitled to the benefit of the relief. If that were so, the whole purpose of the statute would be frustrated, and the ordinary shareholders would still bear the whole burden of the double tax while the preference shareholders would be relieved (at least temporarily) of a part of the single tax which they have borne. Further, it seems probable that, if the appellant succeeded, the preference shareholders, having borne tax at 3*s.* 6*d.* in the £ only, would be liable to be assessed to tax for the additional 1*s.* 6*d.* in the £, in which case the revenue would get back through those shareholders the whole of the sum paid to the company under s. 43 of the Act. My Lords, I think it is impossible that a construction of the Act which would produce such results can be the correct one. I think the true effect of the statute is that, while the repayment is to be made out of the amount paid for tax, the tax "charged" for the purpose of s. 54 of the Act of 1842 remains the same. If so, the preference shareholders are entitled to nothing more, and the amount repaid remains in the coffers of the company.

I agree in all respects with the judgments delivered by the learned judges in the Second Division, and think that the interlocutor appealed from should be affirmed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the judgments delivered in this House and in the Court below.

I may be allowed, however, to express the view that I have considerable doubt as to whether the merits of the appeal depend in any true respect upon the construction of s. 43 of the Finance Act of 1916. I say so for this reason, that I cannot identify the appellants with the persons who are mentioned in that section; and I therefore cannot see how they have any title to claim benefit under it. The section specifically deals with the case of a person who has paid income tax in the United Kingdom providing that he also has paid an Australian income tax in respect of a particular part of his income. In such a case relief is granted so as to prevent,

H. L. (Sc.) 1920

SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

Lord Shaw of Dunfermline.

within the limits of the section, the same taxpayer paying double income tax. It is admitted that the appellants received their income as preference shareholders of this company in full; that is to say, subject to payment of the British income tax alone. It is further admitted that they did not discharge the double burden of paying Colonial income tax. The case accordingly, in my own opinion, is at an end.

The appellants' case seems to have two defects. It mistakes the facts, and, so far as law is concerned, it depends upon a whole network of fallacies. The important part of the case is that the Colonial income tax is paid by the respondents as a company on that part of its income which is earned in New Zealand, or the other Australasian Colonies mentioned in the case; and that Colonial income tax is paid and paid alone on the profits earned in the Colonies. "Said profits are arrived at after meeting the working expenses of" the company "in the said Colonies. The balance of the said profits, after deducting the Colonial income tax paid, is remitted to the United Kingdom and carried to the credit of the general revenue account" of the company. In short, up to that stage, the Colonial income tax is treated and is properly treated as part of the oncost of carrying on the business in these Colonies. It enters the debit charges in the same way as any other item of oncost. A balance on both sides of account is struck, and it is that net balance alone which reaches the United Kingdom. What happens to it there? It forms part of the profits of the Company upon which the United Kingdom income tax is paid. It is perfectly possible to conceive of the business of the company managed at home so excellently well that its finance might be able to yield a balance of divisible profits to the shareholders although there was nothing, or very little, coming in from the Colonies. On the other hand it is perfectly possible to figure a large net balance arising from the Colonies but, owing to loss in the home investments and otherwise, no profit, or very little profit, being payable to the shareholders.

To apply to a position of that kind on the facts any kind of proposition such as was urged for the appellants, to the effect

that the payment of income tax made by the company in the Colonies was a payment made on behalf of individual shareholders and as their agent, is totally inadmissible. In the same sense it might be said that each individual shareholder was the principal in a transaction of paying the salary of every Colonial servant of the company, and that the company itself in its corporate capacity was the mere agent or hand of the individual shareholder.

It is, further, totally inadmissible to say that the individual shareholder has a right to an aliquot portion of the profits earned upon the transactions in the Colonies or to an aliquot portion of relief granted in respect of items in those transactions of the company. There is no such doctrine of aliquot distribution that I am aware of that can be applied to a case such as this. The company having paid Colonial income tax, it is not challenged that the same company paying income tax in this country is entitled, under s. 43 already mentioned, to the rebate which is there set forth. That has been granted. By this means the relief against double payment becomes completely operative. The taxing authority has made the proper allowance. After that, the whole question is not one for the taxing authority, but is one inter socios, that is to say, is one of distribution among the shareholders. That distribution is governed by the articles of the association of the company. These have prescribed by s. 10 that the holders of preference shares or stock shall receive 4 per cent. and no more out of the profits of each year, before the other shareholders receive any dividend. This they have received. The claim preferred by the appellants in this appeal is equivalent to a demand upon their company for more, and to a demand the burden of satisfying which would fall upon the remanent shareholders in the concern. I see no justification for this.

My opinion—against the soundness of the decision of the case of *Rover* (1)—is entirely in accord with that of your Lordships.

(1) [1918] 2 Ch. 233.

H. L. (Sc.) 1920 — SCOTTISH UNION AND NATIONAL INSURANCE CO. v. NEW ZEALAND AND AUSTRALIAN LAND CO.

VISCOUNT FINLAY. I am authorized to state that my noble and learned friend Lord Dunedin concurs in the judgments delivered by your Lordships.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, July 22, 1920.

Agent for the appellants : *John Kennedy W.S., for Cowan & Dalmahoy W.S., Edinburgh.*

Agents for the respondents : *Sherwood & Co., for Maclay, Murray & Spens, Glasgow, and J. & J. Ross W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1920 — *July* 30.

BRITISH AND FOREIGN INSURANCE COMPANY, LIMITED . . . . . } APPELLANTS ;

AND

WILSON SHIPPING COMPANY, LIMITED RESPONDENTS.

Insurance (Marine)—Partial Loss—Damage unrepaired—Subsequent total Loss during the Currency of Policy—Merger.

When a vessel, insured against perils of the sea, is damaged by one of the risks covered by the policy, and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, the insurer is not liable for the unrepaired damage.

Livie v. *Janson* (1810) 12 East, 648 followed.

By a time policy a vessel was insured against marine risks only, but including particular average. The vessel was under charter to the Admiralty on the T. 99 form, under which the Admiralty contracted to pay for loss by war risks, the value to be ascertained at the date of the loss. During the currency of the policy the vessel sustained damage by marine risks, but, to the extent of 1770*l.*, this damage was not repaired. On a subsequent voyage, but during the currency of the policy, the vessel became a total loss by war perils, and the Admiralty in

---

* *Present :* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD SUMNER.

consequence of the unrepaired damage paid the owners 1770*l.* less than they would otherwise have done. The owners claimed to recover from some of the underwriters their proportion of the 1770*l.* :—

Held, that as the unrepaired damage was followed by a total loss during the currency of the same policy the smaller loss merged in the larger, and therefore the underwriters were not liable for the unrepaired damage, notwithstanding the fact that the liability for the total loss did not fall upon them.

Decision of the Court of Appeal [1920] 2 K. B. 25 reversed and decision of Bailhache J. [1919] 2 K. B. 643 restored.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Bailhache J. (2)

The facts are fully stated in the report of the case before the Court of Appeal and in the judgment of the Lord Chancellor, and they are summarised in the headnote.

Bailhache J. held that the appellants, the underwriters, were not liable for the unrepaired damage, but his decision was reversed by the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.), who decided that as the partial loss continued to the prejudice of the owners, notwithstanding the subsequent total loss, there was no merger of the former in the latter, and that the underwriters were liable.

1920. July 2, 5. *MacKinnon K.C.* (with him *Claughton Scott*) for the appellants. The question is whether the appellants are liable under a marine policy for damage sustained by the ship where the damage had not been repaired at the time of her total loss during the currency of the policy. Where the total loss is covered by the policy the matter is expressly provided for by the Marine Insurance Act, 1906. Sect. 77, sub-s. 2, enacts that "where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss." But where, as in this case, the total loss is not covered by the policy the matter is left to be dealt with at common law, for by s. 91, sub-s 2, "the rules of the common law including the law merchant, save in so

(1) [1920] 2 K. B. 25. (2) [1919] 2 K. B. 643.

H. L. (E.) 1920 — BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." This steamer was protected by the appellants against sea risks and was protected by the Admiralty against war risks. Under a marine insurance policy the assured recovers the value of the ship as at the beginning of the policy, notwithstanding subsequent deterioration, but under the respondents' contract with the Admiralty the Admiralty were to be liable only for the ascertained value of the ship at the time of her loss. That is a departure from the ordinary insurance rule, and any loss which the respondents may have suffered is due to their having accepted a contract in that abnormal form. The rule laid down by *Livie* v. *Janson* (1) is that, if during the currency of the policy damage is sustained but is not repaired, and before the repairs are done the ship is totally lost, the assured cannot recover that unrepaired damage. *Livie* v. *Janson* has remained on the books unquestioned for 110 years, it has been constantly cited and approved, it is recognized as an authority in all the text-books, and, even if it was wrongly decided, after so great a lapse of time it ought not now to be overruled. That decision governs this case and it must be either followed or overruled; it cannot be distinguished on the grounds upon which the Court of Appeal sought to distinguish it. In *Stewart* v. *Steele* (2) *Livie* v. *Janson* (1) was approved by the Court of Queen's Bench. In *Knight* v. *Faith* (3) the case was recognized as an authority but distinguished by reason of the fact that the total loss was after the expiry of the policy. In *Lidgett* v. *Secretan* (4) Willes J. states the principle of *Livie* v. *Janson* in language which exactly covers this case. Again in *Pitman* v. *Universal Marine Insurance Co.* (5) Lindley J. puts the appellants' case precisely. The law is accurately summed up in the Laws of England, vol. xvii., p. 469, § 929, in the article on Marine Insurance, which was written by the late Mr. Arthur Cohen K.C. And see Arnould

(1) 12 East, 648.
(2) (1842) 5 Scott, N. R. 927.
(3) (1850) 15 Q. B. 649.
(4) (1871) L. R. 6 C. P. 616, 625.
(5) (1882) 9 Q. B. D. 192, 197.

on Marine Insurance, 2nd ed., vol. ii., pp. 822, 823, 1003, 1004, 1192, 1193.

R. A. Wright K.C. and *Jowitt* for the respondents. The respondents do not challenge *Livie* v. *Janson* (1) but they contend that it does not apply to the present case. The question is: Did the fact of this damage involve loss to the assured at the expiration of the policy? If it did, the underwriters are liable; if it did not, they are not. The ratio decidendi of *Livie* v. *Janson* (1) was that if the physical damage involved no actual detriment to the assured, then the insurer was not called upon to pay. In *Knight* v. *Faith* (2) Lord Campbell states the principle of *Livie* v. *Janson* (1) and the limitation to it. He says: "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and, if a total loss occurs from which they are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured"; and he definitely rejects the contention that *Livie* v. *Janson* (1) is an authority for the proposition that, wherever a partial loss is followed by a total loss for which the insurers are not liable, the partial loss is merged in the total loss. In his view the principle of Lord Ellenborough's decision was founded on the absence of actual detriment to the assured. Here the respondents have suffered loss, because they have a damaged asset instead of an undamaged asset. This is an attempt on the part of the appellants to apply the doctrine of merger as an absolute rule beyond the limits prescribed by the Marine Insurance Act, 1906, s. 77, sub-s. 2. The dictum of Willes J. in *Lidgett* v. *Secretan* (3) as to *Livie* v. *Janson* (1) is not sound. The point was not argued, and the Legislature did not so state the law when dealing with merger. If Willes J.'s statement had been recognized it would have found its place in the Act. It is contrary to the principle of indemnity. The dictum of Lindley J. in *Pitman* v. *Universal Marine Insurance Co.* (4) is also wrong. It was obiter only and it was not indorsed by

(1) 12 East, 648.
(2) 15 Q. B. 649, 668.
(3) L. R. 6 C. P. 616, 625.
(4) 9 Q. B. D. 192, 197.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

any of the judges in the Court of Appeal. They also referred to *Castellain* v. *Preston* (1); *The Dora Forster* (2); and *Potter* v. *Campbell*. (3)

The House took time for consideration.

1920. July 30. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an Order of the Court of Appeal reversing a judgment of Bailhache J. in an action brought by the respondents against the appellants for a loss under a policy of insurance.

The respondents were the owners of the steamship *Eastlands*, which was insured against marine risks under a time policy for the period from February 20, 1917, to February 20, 1918. The appellants were among the subscribers to that policy. There was no policy covering war risks, but during the whole of the currency of the marine insurance policy the vessel was chartered to the Admiralty under the form of charter known as T. 99, whereby among other obligations the Admiralty assumed all responsibility for war risks, and agreed, in the event of a total loss from such risks, to pay to the respondents the ascertained value of the vessel at the time of such loss.

On three several occasions—namely, on September 16 and 19 and October 29, 1917, the ship sustained damage from marine risks. On December 17, 1917, she was dry docked and surveyed at Cardiff, when temporary repairs were effected to make her seaworthy, but permanent repairs, estimated to cost 1770*l*., were postponed, and in fact were never executed, for on January 25, 1918, the vessel was torpedoed by an enemy submarine and became a total loss.

The respondents have received from the Admiralty a sum of money which was calculated by deducting from the agreed "sound" value the sum of 1770*l*., which is the estimated cost of the repairs which were never executed.

There is no dispute as to the appellants' liability for the cost of the temporary repairs. They have paid their

(1) (1883) 11 Q. B. D. 380. (2) [1900] P. 241.
(3) (1867) 16 W. R. 399.

proportion, but as to their share of the estimated cost of the unexecuted repairs they dispute liability on the ground that they are not bound to pay for damage which, before it was repaired, was followed during the currency of the policy by a total loss.

The question which requires decision is whether under a policy of marine insurance the assured can recover in respect of damage sustained by the ship insured during the currency of the policy when the ship is totally lost before the damage is in fact repaired.

It is evident that two aspects of this question may arise: (1.) Where the total loss is caused by a peril insured against by the policy in question; (2.) Where the total loss is not covered by that policy. The first case, as to which no question is raised on this appeal, is governed by s. 77, sub-s. 2, of the Marine Insurance Act, 1906. The second case, which requires decision, is not dealt with by the Act. Some attempt was made to found argument upon this omission, but no inference can properly be drawn from it either way. It is necessary to examine the law as established by the existing authorities, in conformity with the provision contained in s. 91, sub-s. 2, of the Act that "the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

The earliest case which requires consideration is *Livie* v. *Janson* (1), which was decided by Lord Ellenborough in 1810. The action was brought upon a policy of insurance upon the ship *Liberty*, the insurance being declared "to be on ship and cargo warranted free from American condemnation." During the currency of the insurance the ship was damaged by ice driving the ship ashore. The master and crew endeavoured without success to get the ship off and the next morning she was discovered and seized by the American authorities. Lord Ellenborough stated the issue in these terms: "The ship and goods were damaged by the perils

(1) 12 East, 648, 653, 654.

H. L. (E.) 1920 — BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO. — Lord Birkenhead L.C.

of the seas, and were afterwards seized by the American Government, and condemned: and the question is whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea damage?" And he states his conclusion: "We may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?"

In whatever form the principle upon which this decision is based should be stated, the decision itself is clearly right. If not, the assured whose vessel becomes a total loss during a voyage in the course of which she meets a succession of gales, each of which causes damage, would, in a case to which s. 77, sub-s. 2, of the Act of 1906 does not apply, be in a position to claim under his policies for each of these losses in succession, although none of them is or could be repaired, and he could at the same time recover the value of the ship as a total loss if she is wrecked during the currency of the policies. Such a result would, of course, be contrary to the principles upon which marine insurance has always been conducted. The owner would not in such a case merely be indemnified against loss, but he would receive a profit.

Stewart v. *Steele* (1) was a case in which *Livie* v. *Janson* (2) was cited and discussed both during the argument and in the judgments. Maule J. in the course of his judgment stated the fundamental principle: "That the proper time to estimate the loss where the party is put to no expense,

(1) 5 Scott, N. R. 927, 949. (2) 12 East, 648.

is, at the expiration of the risk." This principle underlies the decision of Lord Ellenborough, for as Maule J., in an earlier passage on the same page, says: "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss, which nothing could afterwards divest. That, I apprehend, is quite contrary to the doctrine laid down by Lord Ellenborough in *Livie* v. *Janson*." (1) The learned judge was of opinion that, inasmuch as the time for assessing unrepaired damage is at the expiration of the risk, if the vessel is totally lost before the risk expires there is nothing upon which such assessment can be made.

Knight v. *Faith* (2) contains a comment by Lord Campbell C.J. upon *Livie* v. *Janson* (1), and the other judges of the Court were parties to this comment. He remarked: "The insurers on a ship, if they pay a total loss, certainly are not liable likewise in respect of any prior partial loss which has not been repaired; and, if a total loss occurs from which they are exempt, they are not liable for any prior partial loss which in that event does not prove prejudicial to the assured," and he pointed out that in *Livie* v. *Janson* (1) the risk which caused the total loss was expressly excepted from the policy.

Such was the state of the authorities at the date when the last edition which was prepared by the author of Arnould's Law of Marine Insurance was published in 1857. In that work (2nd ed., vol. ii., pp. 1003 and 1004) the late Mr. Arnould stated the law in the following terms: "If a ship has been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either quâ average, or as money laid out and expended in labouring for the safeguard and recovery of the ship under the general printed clause in the policy: but this rule only applies to repairs actually made; hence, where a ship was put back twice in distress, and, on the first occasion was actually recoppered, but on the second occasion was only surveyed, but not repaired, and in the course of the survey

(1) 12 East, 648. (2) 15 Q. B. 649, 668.

H. L. (E.) 1920 BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO. Lord Birkenhead L.C.

some of her wales, etc., were necessarily removed, in order to examine her timbers, and never replaced, but sold, with the rest of the ship, as wreck, it was held, that the cost of the recoppering might be recovered in addition to a total loss, but not the estimated expense of replacing the wales: where no repairs have been made, no previous partial loss by sea damage can be recovered from the underwriter, as a particular average, in addition to a subsequent total loss; but where a previous partial loss, though unrepaired, is followed by a sale of ship, which, not being justifiable, does not transfer the property, nor operate a total loss, such partial loss may be recovered."

It is clear from the footnotes that the learned author did not forget that the subsequent total loss might be from a risk excepted from the policy, and that he did not consider that this circumstance affected the liability of the underwriters for unrepaired partial damage. In other words, if, after partial damage has been sustained and before it is repaired, the ship is totally lost during the currency of the policy, then, in his opinion, the underwriter is under no liability for such partial damage whether he has to pay a total loss or not.

The next case of importance is *Lidgett* v. *Secretan* (1) decided by Willes J. In that case while a ship which had suffered partial damage was being repaired the policy expired and shortly afterwards before the repairs could be completed she was totally destroyed by fire. During the argument the learned judge remarked that the reason for applying the doctrine of merger "where the partial loss and the total loss occur during the continuance of the same risk is obvious: the parties never intended that the insurers should be liable for more than a total loss in any event. But the same reason does not apply where the partial loss takes place during the period covered by one policy and the total loss whilst the ship is insured for a different voyage and under another policy," and in his judgment he reverts to this topic and comments on *Livie* v. *Janson* (2): "There is another case,

(1) L. R. 6 C. P. 616, 625. (2) 12 East, 648.

viz. where, after the vessel has sustained damage, but has not been repaired, and has subsequently, and during the currency of the policy, been totally lost by a peril excepted out of the policy, and in respect of which the owner was his own insurer. Such was the case of *Livie* v. *Janson*." (1) Mr. Wright admitted that if this passage were good law then the respondents must fail, but he contended that the dictum was wrong. It is not necessary in this House to insist upon the respect which is due to any considered opinion of Willes J.

Lindley J. in *Pitman* v. *Universal Marine Insurance Co.* (2) made a pronouncement to the same effect as that of Willes J., and Mr. Wright also admitted that if this opinion was in law well founded the respondents in this case are wrong. *Pitman's Case* turned upon the question what is the true principle upon which an unrepaired loss is to be estimated. In the course of his judgment Lindley J. remarked: "Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss; he cannot claim both." The judgment of Lindley J. was upheld by the Court of Appeal with a variation which is not relevant to this part of his judgment.

The authorities establish the existence of a rule whereby underwriters are not liable for unrepaired damage if there is a total loss before the expiration of the policy. As stated by Lord Ellenborough in *Livie* v. *Janson* (1), and by the Court of Queen's Bench in *Knight* v. *Faith* (3), the rule

(1) 12 East, 648. (2) 9 Q. B. D. 192, 197.
(3) 15 Q. B. 649.

H. L. (E.) 1920 — BRITISH AND FOREIGN INSURANCE Co. v. WILSON SHIPPING Co. — Lord Birkenhead L.C.

might appear to be limited to the case where the previous deterioration became ultimately a matter of perfect indifference to the assured's interests. Bailhache J. (adhering to the view expressed by Willes J. and Lindley J. in the cases cited) came to the conclusion that there was no such limitation. The Court of Appeal, on the other hand, having regard to the statement of the rule by Lord Ellenborough and Lord Campbell, were of opinion that the condition was an integral part of the rule, and therefore that the present case was on the facts distinguishable from *Livie* v. *Janson*. (1) If Lord Ellenborough's words are taken to mean that the circumstance, more than once, and somewhat pointedly, insisted on, is a condition to the application of the rule, the Court of Appeal may well have been right in the distinction which they drew. I have, however, come to the conclusion that no such condition ought to be admitted. Lord Ellenborough was dealing with unusual facts and his judgment must be construed in relation to those facts, but the rule ought not to be limited in the manner suggested. I adopt the reasoning of Bailhache J. in the following passage from his judgment (2): "Whether an underwriter is or is not liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls upon him or is due to an excepted peril against which the owner is insured or uninsured. The true doctrine is that the smaller merges in the larger and the rule is not limited to the ground upon which it was based by Lord Ellenborough—namely, that there was no continuing prejudice. . . . . The question in every case must be, did the total loss happen before the underwriter's liability for the unrepaired damage accrued? If yes, he is not liable; if no, he is liable. It would be strange if an underwriter's liability . . . . should vary with the terms of

(1) 12 East, 648.

(2) NOTE: This passage is taken from the Appendix.

some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance."

It is beyond doubt that if the respondents had been their own insurers they could not have recovered. Their argument in effect is that by an independent contract of their own which confers on them a right of indemnity they have been enabled to increase the burden on the insurers, and this by reason of the circumstance that, as it has been applied, they have not obtained a complete indemnity. As to the amount which the Admiralty deducted from the "sound" value the respondents were their own insurers, and their loss is due therefore not to a peril insured against but to their failure to obtain complete indemnity under the terms of their charterparty. Such a cause is no concern of the underwriters and cannot, in my judgment, be treated as a material fact in determining their liability.

The true rule is capable of statement in the following proposition. When a vessel, insured against perils of the sea, is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage. The rule so stated embodies the principle upon which underwriters and merchants have based their practice in such matters for upwards of a century, and, even if this House were of opinion that the rule did not correctly state the law, it would be a matter for grave consideration whether such a rule, which has been observed for so long, which has been expressly or impliedly incorporated in so many contracts, and which has profoundly influenced the course of dealing between merchants, should be reversed at this period of its history. In my opinion, this question does not arise.

For the above reasons, I am of opinion that the judgment of the Court of Appeal should be reversed and that of Bailhache J. be restored and I move your Lordships accordingly.

H. L. (E.)
1920
BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

VISCOUNT FINLAY. My Lords, the facts in this case are few and simple. The Wilson Company were the owners of the *Eastlands* steamship. That vessel was chartered to the Admiralty under the form of charter known as T. 99, under which the Admiralty are not liable for any sea risks, but undertake risks of war "on the ascertained value of the steamer if she be totally lost at the time of such loss or if she be injured on the ascertained value of such injury." The Wilson Company insured the steamer against sea risks in the value of 82,000*l.* under a time policy subscribed by the appellants, the British and Foreign Insurance Company, covering the period from February 20, 1917, to February 20, 1918.

In September and October, 1917, the *Eastlands* sustained damage by sea risks and put into Cardiff for repairs. The repairs were estimated at 2698*l.* Repairs to the amount of 928*l.* were executed, but as the vessel was urgently wanted by the Admiralty the remaining repairs, estimated at 1770*l.*, were not executed. The vessel proceeded to sea, and on January 25, 1918, she was torpedoed by a German submarine and sunk. The Admiralty agreed with the owners that 82,000*l.* represented the sound value of the *Eastlands* at the time of the loss, but claimed to deduct from this the value of the repairs which had not been executed—1770*l.* The amount paid to the owners was therefore 80,230*l.* The owners have been paid the value of the repairs actually executed at Cardiff, but the underwriters dispute their liability for the 1770*l.* in respect of the unexecuted repairs on the ground that the total loss occurred during the currency of the policy of insurance against sea risks and that the recovery for the unrepaired partial damage is barred under the authority of *Livie* v. *Janson*. (1)

The case came before Bailhache J., who decided against the claim on the authority of *Livie* v. *Janson*. (1) His decision was reversed by the Court of Appeal, where it was held that the principle there laid down did not apply if in the event the owner was damnified by the partial loss, and that there was such damnification in the present case, inasmuch

(1) 12 East, 648.

as but for the unrepaired damage the Admiralty would, under the contract of charterparty, have paid to the owners 1770*l.*, beyond the 80,230*l.* actually paid.

The liability of the insurer in the case of total loss in any ordinary insurance is for the value of the vessel at the commencement of the risk. If the indemnity given by the Admiralty against war risks had been in that form no claim for the partial loss would have arisen, as the payment for the total loss would have been on the sound value of the ship at the commencement of the risk. The question in the case is whether the shipowners are entitled for this purpose to rely on the fact that by reason of their special bargain with the Admiralty there fell to be deducted from the value of the vessel the sum of 1770*l.* in respect of the unrepaired damage as taking them out of the rule in *Livie* v. *Janson*. (1) In that case the insurance was on ship and cargo from New York to London, warranted "free from American condemnation," these last words having reference to an embargo that had been imposed by the United States Government. The vessel, in leaving New York, was driven by floating ice upon the rocks and seriously damaged. She was seized by the officers of the American Custom House, and the ship and cargo were condemned for breach of the embargo. The policy covered the deterioration in the vessel and cargo due to the sea damage, while in respect of the total loss by seizure and condemnation the owner was his own insurer. Lord Ellenborough held that the underwriter could not be made liable for the sea damage. He said (2): "Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. . . . . If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon

(1) 12 East, 648. (2) 12 East, 654.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

Viscount Finlay.

him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged ? "

If the damage resulting from the sea perils had been repaired the amount disbursed for that purpose would have been recoverable on the policy in spite of the subsequent loss. But if the repairs have not been executed the liability cannot accrue until the termination of the risk under the policy, and if, before that happens, there is a total loss, the partial loss is " swallowed up " in the total (p. 652).

The decision in *Livie* v. *Janson* (1) is attacked by Mr. Phillips in his Treatise on the Law of Insurance, 5th ed., vol. i., ss. 1136 and 1137. I am unable to agree with the criticisms there made. *Livie* v. *Janson* (1) was carefully considered by Willes J. in *Lidgett* v. *Secretan*. (2) In that case there was an outward policy at and from London to Calcutta, and for thirty days after arrival, and a homeward policy at and from Calcutta to London, both of which were underwritten by the defendant. On the outward voyage the vessel sustained damage from sea perils. She reached Calcutta, and was dry docked for repairs. While repairs were in progress the outward policy expired, and afterwards, and while the ship was still at Calcutta, she was totally destroyed by fire. It was held that under the homeward policy the assured were entitled to recover for total loss in respect of the fire, and that under the outward policy the accused were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage on the outward voyage without reference to the sum actually expended on her repairs. During the argument an extract was read from a short-hand note of a judgment by Willes J. in a previous case: *Potter* v. *Campbell* (3), in which he said: " The doctrine of merger must be limited to a loss happening during the period over which the underwriter's liability extends." On the same page Willes J. is reported as having said in the

(1) 12 East, 648.

(2) L. R. 6 C. P. 616, 620, 625, 626.

(3) 16 W. R. 399.

course of the argument that the doctrine of merger could not apply where the partial loss takes place during the period covered by one policy and the total loss while the ship is insured on a different voyage and under another policy. Willes J. develops this at some length in the judgment, and the decision was that there was no merger.

This amounts to a recognition of the correctness of the decision in *Livie* v. *Janson* (1), while it is pointed out that the decision has no reference to a case in which the risk under the policy covering the partial damage has run out before the total loss.

Livie v. *Janson* (1) was decided in 1810, and has always been recognized in England as a decision of authority. It was referred to with approval in *Stewart* v. *Steele* (2) by Maule J. during the argument and in his judgment. In *Knight* v. *Faith* (3) it was recognized by Lord Campbell, while it was pointed out that in the particular circumstances of that case its doctrine did not apply. It has been generally recognized in the text-books. In my opinion *Livie* v. *Janson* (1) is good law and the only question is as to the limits within which the doctrine there laid down is applicable.

Lord Ellenborough in *Livie* v. *Janson* (1) pointed out that by the supervening total loss the unrepaired partial loss had become a matter of indifference to the owners. In *Knight* v. *Faith* (4) Lord Campbell said that in *Livie* v. *Janson* (1): "The assured, in the event which happened, were not in any degree prejudiced by the partial loss, which only rendered the ship less valuable to the American Government, the assured being in the same situation as if the partial loss had never occurred."

In the present case the applicants contend that they have been prejudiced by the partial loss, inasmuch as in respect of it they have received 1770*l.* less from the Admiralty than they would otherwise have received. This is true, but the clause of indemnity in the charterparty is a special one. Under the

(1) 12 East, 648.
(2) 5 Scott, N. R. 927, 941, 949.
(3) 15 Q. B. 649.
(4) 15 Q. B. 668, 669.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE Co. v. WILSON SHIPPING Co.

Viscount Finlay.

ordinary policy what is recovered in respect of a total loss is the value of the ship at the commencement of the risk. If the indemnity under clause 19 of the charterparty had been in respect of the value of the steamer at the commencement of the risk, there would have been no prejudice to the assured by reason of the partial loss. He would have recovered the value of the vessel as it stood at the commencement of the risk, when the partial loss had not occurred. It is only by reason of the special bargain with the Admiralty contained in clause 19 of the charterparty that he received from them less in respect of the unrepaired partial damage.

Bailhache J., in the course of his judgment, said (Appendix, p. 55): "It would be strange if an underwriter's liability, which is that a ship shall remain unhurt by a peril insured against during the currency of the policy, and whose liability is determined by her loss during the insured term by an excepted peril, should vary with the terms of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance. . . . . In my judgment the plaintiff's position, by reason of his charterparty with the Admiralty, is an irrelevant circumstance."

The judgments in the Court of Appeal do not appear to me to deal adequately with this point. They proceed on the basis that the very special nature of the bargain with the Admiralty which reduced the amount payable by the value of the unrepaired damage may be disregarded. They treat the loss of the 1770*l.* as if it had happened in the ordinary and natural course of things, whereas it occurred only by reason of the special terms in clause 19 of the charterparty.

There is no evidence that the existence of this special clause was known to the insurers in respect of sea risks. Indeed, counsel for the respondents, in answer to a question put by the Lord Chancellor, disclaimed resting his case upon any such ground. I express no opinion as to what would have been the liability of the insurers in the present case if there had been evidence from which it could be inferred that their contract of insurance was entered into with reference to

the special liability of the Admiralty for total loss under the charterparty.

In my opinion the appeal should be allowed.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree with the judgment of Bailhache J. in this case, and I venture to express my full concurrence with the views set forth by my noble and learned friend on the Woolsack in his address.

Out of respect to the Court of Appeal I think it right to add these few words.

The *Eastlands* was torpedoed by an enemy submarine and became a total loss on January 25, 1918. She had had during the preceding few months several mishaps, and then had been sufficiently repaired to make her seaworthy. All these repairs have been met by the underwriters. There was, however, unrepaired damage done to the vessel to the extent of 1770*l.* When the vessel was totally lost, the "sound" value of the steamer was ascertained to be 82,000*l.*, and the damaged value necessarily 1770*l.* less. Had accordingly that 1770*l.* been expended by the owners on the repair of the vessel, they would have received 82,000*l.* for the total loss. What the owners, however, now claim is that they are entitled to finance the situation on the footing that having received 80,300*l.* from the Admiralty, they are entitled to receive a further payment of 1700*l.* from the appellants in order to indemnify them against making good a repair on the vessel to the extent of 1770*l.*, although the fact is no repair upon the vessel is now possible. The question is whether the law of England justifies such a demand.

In my own opinion no doubt can be cast on the accuracy of the judgment in the case of *Livie* v. *Janson*. (1) It is one of a long series. It has never been disapproved. On the contrary has been uniformly accepted as sound law.

Livie v. *Janson* (1) was decided in 1810. In 1842 came *Stewart* v. *Steele* (2); in 1850 *Knight* v. *Faith* (3); in 1871

(1) 12 East, 648. (2) 5 Scott, N. R. 927.
(3) 15 Q. B. 649.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

Lord Shaw of Dunfermline.

Lidgett v. *Secretan* (1); and in 1882 *Pitman* v. *Universal Marine Insurance Co.* (2) It will not be found in this series of cases of high authority that doubt has been cast upon *Livie* v. *Janson.* (3)

There are two dicta in the course of that series to which I wish to make special reference.

In *Stewart* v. *Steele* Maule J. puts the actual issue involved in the argument of the appellants thus (4): "It is said that the plaintiff had a vested right of action at the moment of the happening of the loss, which nothing could afterwards divest." The answer he gave was clear: "That, I apprehend, is quite contrary to the doctrine laid down by Lord Ellenborough in *Livie* v. *Janson.*" (3) Further according to Maule J., and in this I think he stated acknowledged law; the proper time of estimating the loss where the party is put to no expense is at the expiration of the risk.

Further, what appears to me to approach most nearly to the fundamental principle of such cases, is to be found clearly set forth in the judgment of Lord Lindley (then Lindley J.) in *Pitman's Case.* (5) I venture to repeat it. "Against what do the underwriters agree to indemnify the insured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss; he cannot claim both." That is expressly the principle which underlies s. 77, sub-s. 2, of the Marine Insurance Act of 1906. It is true, of course, that that section is framed to cover the case of a partial loss, and a total loss, "under the same policy." But the common law of England was not

(1) L. R. 6 C. P. 616. (2) 9 Q. B. D. 192. (3) 12 East, 648.
(4) 5 Scott, N. R. 949. (5) 9 Q. B. D. 197.

repealed by that statute, and in my opinion no argument to that effect can be derived from s. 77, sub-s. 2, dealing with the one specific case.

My Lords, when a ship, damaged but only partially repaired, is totally lost, it of course becomes impossible to complete her repair. No contract of indemnity can apply to being recouped for such repair, because that would be to present a false and impossible demand for indemnification—i.e., indemnification for an expenditure which can never be made. If once the principle of indemnity were extended the length of permitting a mere right of action to be the ground or the measure of the indemnity, then the reality of the case is lost sight of, for the right of action is a mere abstraction and represents in truth a right to be recouped for expenses which can never be laid out, and the word "indemnity," or the word "recouping," fails on account of sheer self-inconsistency. One finds oneself not in the region of indemnity against loss, but in the region of profit-earning. This is contrary to all sound principles of Marine Insurance, and apart from all those authorities which have been most properly canvassed, I am of opinion, on the principle I have just stated, that this appeal should succeed.

LORD MOULTON. My Lords, the question raised by this appeal is one of great gravity. It is in substance the question whether the law laid down by the decision in *Livie* v. *Janson* (1) should be reversed. This decision, delivered by a judge of great eminence, has formed part of the law of marine insurance in this country for more than a century. It has been accepted and acted upon again and again without hesitation by our Courts, and the respondents have been unable to produce to us any later decision that throws doubt upon it. Judges of great eminence have taken part in decisions which have treated it as sound law. It is so treated in all the text-books, and there can be no doubt that contracts of insurance to which it applies have during this long series of years been framed on the basis of its authority. Under such

(1) 12 East, 648.

H. L. (E.)
1920
BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.
Lord Moulton.

circumstances, I should have felt great reluctance in setting aside such a decision even if I felt some doubt as to whether the reasoning of the judgment might not be open to criticism. But I feel no such doubt. In my opinion the decision was right in every respect, and I am glad that your Lordships' house has an opportunity of giving to it its express authority. Indeed, if the case of *Livie* v. *Janson* (1) had been decided otherwise the decision would, in my opinion, have been so inconsistent with the principles of our law of insurance that it would not have stood the test of time, but would have been speedily differed from by other Courts and would ultimately have been set aside. The only alternative to that decision would have been to hold that when damage was done by perils insured against there instantly accrued a pecuniary claim against the insurer for the estimated cost of the repairs whether done or undone, a doctrine which, among other things, would have led to the absurd result that all the damage done to a ship immediately before or in a storm in which she was totally lost might be claimed as particular average by an owner who had not insured against total loss.

I am aware that the judgments of the learned Lords Justices in the Court below are not formally based on a dissent from the decision in *Livie* v. *Janson*. (1) They purport to distinguish it upon a point arising out of the special facts of that case, and accordingly they give such an interpretation of the judgment delivered by Lord Ellenborough in that case as to make it inapplicable to the case now before us. My Lords, I am of opinion that the interpretation which they give to the decision makes it turn on a matter which did not constitute any portion of the reasoning which led to that decision. But I go farther. In my opinion the facts of this case, so far as they are relevant to the right of the parties, make it an exact parallel to the case of *Livie* v. *Janson* (1), so that, however the language of the judgment in that case be interpreted, the present case must fall within it. It is only by admitting into their consideration facts which

(1) 12 East, 648.

ought to have been excluded by reason of their being res inter alios actæ that the learned members of the Court of Appeal have been able to raise a doubt as to whether this case comes precisely within the law as laid down in *Livie* v. *Janson*. (1)

The facts of this case are very simple. The steamship *Eastlands* belonging to the respondents was insured with the appellants against total loss on a valued policy for 82,500*l*. That policy included also an insurance against particular average. War risks were excluded. She sustained damage at sea which was partially repaired at Cardiff at a cost of 928*l*., and this sum has been duly paid to the respondents by the insurers. There remained unrepaired damage to an estimated amount of 1770*l*. The ship then sailed from Cardiff and was totally lost by an excepted risk. The above are all the facts relevant to the liability of the appellants under the policy, and according to the decision in *Livie* v. *Janson* (1) the total loss of the vessel puts an end to all claim for the cost of the unexecuted repairs which have now been rendered impossible by the total destruction of the thing to be repaired.

What is then the claim of the plaintiffs in the action? They allege that they made a contract with the Government relative to the charter of the vessel which, while covering them to a certain extent from the excepted perils, did not cover them with regard to unexecuted repairs. My Lords, what have these matters to do with the liabilities of the insurers under the policy which they signed? It is admitted in the frankest manner by the counsel for the respondents that the insurers had no connection whatever with the contract between the respondents and the Government, or with the circumstances under which the respondents entered into that contract. It is also admitted (as is otherwise evident) that the losses sued for in this action are solely due to the special provisions of that contract. To quote from the judgment of Bankes L.J. (2) "the question is . . . . what have the appellants (i.e., the present respondents) in fact

(1) 12 East, 648.

(2) [1920] 2 K. B. 36.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

Lord Moulton.

lost under the contract with the Government by reason of the fact that the vessel had sustained the partial damage which had not been repaired?"

These considerations appear to me to decide the rights of the parties to this action. The insurer's liabilities are fixed by the contract that he has signed and cannot be increased by any act of the assured to which he is no party. It is true that those liabilities may in some cases be lessened by such acts as in a case where the assured has made further contracts which give rise to rights of contribution. But they cannot be increased. This rests on something deeper than the special law of insurance. It is a fundamental principle of our law of contracts. So far as the insurers were concerned they might therefore assume that the assured was making no insurance against the excepted perils and was taking the war risks on himself. It was immaterial to them whether he was so doing or not so long as they remained strangers to any action that he might take in the matter. I fully agree with the language of Bailhache J. in his judgment in this case when he says: "It would be strange if an underwriter's liability, which is that the ship should remain unhurt by a peril insured against during the currency of the policy, and whose liability is determined by her loss during the insured term by an excepted peril, should vary with the terms of some contract not needing to be disclosed to him which the owner has made with some stranger to the contract of insurance," and I also agree with his language at the conclusion of his judgment to the effect that "the plaintiff's position by reason of his contract with the Admiralty, is an irrelevant circumstance."

It is because I am of opinion that the Court below should have on these grounds excluded the matter of the contract with the Admiralty from their consideration in determining the liabilities of the appellants that I regard this case as differing in no respect from the case of *Livie* v. *Janson* (1), which I hold to have been rightly decided. I am, therefore, of opinion that this appeal should be allowed and the

(1) 12 East, 648.

judgment of Bailhache J. should be restored and that the appellants should have their costs here and in the Court below.

LORD SUMNER. My Lords, s. 77, sub-s. 2, of the Marine Insurance Act, by using the words "under the same policy," enacts something narrower than the decision in *Livie* v. *Janson* (1), for in that case a partial loss, insured under the policy in suit, was followed by a total loss during the same voyage but not insured under that policy. I do not know why this course was taken. The section is one of a fasciculus of sections headed "Measure of Indemnity," throughout which the words "a policy" and "the policy" are constantly used to denote not merely a single instrument, whether subscribed by one underwriter or by many, but also an entire insurance on the same subject-matter, which is spoken of as one insurance and referred to as if it was expressed in one instrument, although in fact the total value insured in respect of that subject-matter may only be fully covered under several instruments or even may only be partially covered by them, while for the residue the assured, as it is said, "becomes his own underwriter."

I surmise, therefore, that what this section is really referring to by these words is not a single instrument covering two losses, which are not simultaneous, but is an aggregate insurance, effected in one or more policies on one subject-matter, in which the assured is his own underwriter both for any uncovered part of the total value of his insurable interest in it, and also for any uncovered peril among the aggregate of the perils, to which the subject-matter is actually exposed. If so, the words "under the same policy" mean "during the adventure insured," whether it be a voyage or a period of time.

The question is more curious, however, than important, for s. 91, sub-s. 2, preserves *Livie* v. *Janson* (1) to its full extent according to the true construction, unless and until it is overruled. What, I think, is important is, that the Act says

(1) 12 East, 648.

H. L. (E.) 1920 — BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO. — Lord Sumner.

nothing about the partial loss becoming ultimately a matter of perfect indifference to the assured's interest, but only speaks of a sequence in time between a partial loss and a total loss, and of the partial loss not having been repaired. No inference against taking the rule in *Livie* v. *Janson* (1) in its widest sense can be drawn from the Marine Insurance Act, but I think that the language of s. 77, sub-s. 2, is against the limited construction placed on that rule by the Court of Appeal.

In my opinion, Lord Ellenborough's language does not mean that two conditions must concur to relieve an underwriter from liability for unrepaired damage; first, the occurrence of a subsequent total loss and, second, an absence of any pecuniary interest whatever in the unrepaired partial loss. The words—"and the previous deterioration becomes ultimately a matter of perfect indifference to his interests"—explain the effect which the subsequent total loss has on the prior unrepaired damage, and so justify the rule.

Bankes L.J. reads the words as though Lord Ellenborough had only said "where the previous deterioration becomes ultimately a matter of perfect indifference to his interests" and had confined the rule to that case; but they do not really except out of the rule cases where, owing to matters not within the terms of the insurance, the partial loss happens to affect the rights of the assured under contracts, to which the underwriter is a stranger. It is simply a fuller expression of the idea afterwards expressed by the word "merger." If the rule means that unrepaired partial losses are swallowed up in subsequent total loss when the assured is none the worse for them, but survive and must be paid for if he would be out of pocket unless he recovers for them on the policy, inadmissible results would follow. I do not see why on this argument the unrepaired partial loss by marine perils should not be recoverable from the marine underwriters on the simple ground that, owing to the insolvency of war-risk underwriters, no indemnity at all can be got for the subsequent total loss by hostilities. So stated, the principle

(1) 12 East, 648.

is independent of proximate or direct causation. It would not matter whether the pecuniary prejudice was the direct or the indirect consequence of the partial loss. If indirect prejudice, directly due to the form of the charter T. 99, enables the assured to recover for the partial loss unrepaired, so would diminution of freight-earning power under the charter, consequent on the damage being unrepaired. On the other hand, if there were a rise in shipping values after the damage was done, which partially or wholly restored the value of the ship as at the date of the total loss to what it had been before the damage was done, this, by throwing on to the Admiralty under the charter part or the whole of the amount of the depreciation due to the absence of repair, would diminish or do away with the marine underwriter's liability. In this case his liability would be made to depend on market fluctuations of the value of the ship during the currency of the policy.

Nor am I pressed by the statement that in some cases "the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss." If *Livie* v. *Janson* (1), where the assured had no policy against capture, was not such a case, a fortiori the present case is not either. Further, the illustrations put for the purpose of showing that the rule in *Livie* v. *Janson* (1), widely applied, may produce anomalous consequences, seem to me to be either fortuitous hard cases or to be instances of want of skill in arranging the details of the insurances effected. If an assured chooses to be his own underwriter against collision and to look only to the ship that is to blame, no doubt he may come off worse than if he had insured, but this is not a reason for increasing the liability of the underwriters, with whom he insured, beyond what it would have been if he had taken out a policy against the risk of collision. I do not see anything intrinsically in conflict with a contract of insurance in the proposition, that perils insured against have not caused any direct loss where although the ship was damaged the owner had nothing to

(1) 12 East, 648.

H. L. (E.) 1920

BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

Lord Sumner.

pay, and although the ship was depreciated, she ceased to exist as a ship before the time came for measuring the amount to be recovered for it. At that date there was no pecuniary loss against which the owner could be indemnified.

My Lords, I agree that it is not now practicable to overrule the law as it has so long been understood to have been laid down in *Livie* v. *Janson*. (1) I do not, however, rely merely on its authority. I think it is fully consistent with what I take to be the principles of marine insurance. In practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract. Where all the risks, to which a ship is exposed at one time, are covered by each of several underwriters, and it is only the total amount of the insurance that is distributed, the aggregate of the insurance is regarded as having been designed to give one indemnity, and for certain purposes the policies are so applied. If the assured has not insured the full value insurable, he is deemed to be his own underwriter for the residue.

The foundation of the rule in *Livie* v. *Janson* (1), of course, is that an assured cannot be allowed to recover under a contract of indemnity both a total loss which he has suffered, and a partial loss which in substance he has not. It is said, and truly, that it is a rule to prevent the assured from recovering more than a full indemnity, not a rule to save underwriters from having to pay a full indemnity. But what is a full indemnity ? If the application is limited to the one policy in suit, or to the one subscriber sued, the whole attempt to restrict the assured to one full indemnity fails at once. If it extends to the whole body of assurances, which he takes out in respect of all risks affecting the subject-matter of insurance during the voyage or time adventured upon, the measure of a full indemnity is only got by looking at the risks run, not at the persons liable for them. Otherwise, the indemnity would be full or more than full at the mere choice of the assured.

It seems to me that the aggregate of the insurances is to be looked at, where it is the perils insured against that are

(1) 12 East, 648.

distributed, and some perils causing loss, or some categories of loss so caused, are covered by one person and some by another. I do not see why an assured should be allowed to recover more than an indemnity where his war-risk is placed with A. and his marine risk with B., if he could not have done so had both been placed with A. or both with A. and B. in equal moieties. Further, and for the same purpose —namely, that of reducing insurance as far as possible to a complete indemnity—I do not see why an assured should not be considered to be his own underwriter where he places one set of risks with one set of underwriters and another with another, just as much as where one set of underwriters covers all, though not to the full amount.

If he has not assured a complete indemnity by effecting contracts which will procure it for him, the owner must to the extent of the deficit be treated as having underwritten it himself. I regard art. 19 of Charter T. 99 as an insurance policy for this purpose. In the event which happened, it fell short by 1770*l.* of covering the full value, in which the assured was interested, when the contracts were first effected. Accordingly I think that he must be treated as being his own underwriter for the difference between the ship's value when totally lost, which is all that he covered with the Admiralty, and the ship's value at the inception of the risk, which is her value for the purposes of the other policies according to ordinary rules and apart from special valuations, which do not seem to affect the principle. Whether he insured in this manner with the Admiralty because he chose to do so, or because he could not help himself, is immaterial.

I agree further that the 1770*l.* was lost directly by the form in which the liability of the Admiralty is expressed, in the sense that from the time when the charter became effective the assured had made himself the party to bear any depreciation from unrepaired partial damage, which might exist at the time of the total loss. Of course it is not contended that he can alter the meaning of his marine policy by the arrangements that he chooses to make with the Admiralty, but I think it is equally impracticable to say that the marine

H. L. (E.) 1920 — BRITISH AND FOREIGN INSURANCE CO. v. WILSON SHIPPING CO.

policy impliedly promises to pay for unrepaired damage if less than the original value is recoverable under the charter for a subsequent total loss, but not to pay for it when the charter provides otherwise.

I therefore think that the appeal succeeds, and that the judgment of Bailhache J. should be restored.

Order of the Court of Appeal reversed and judgment of Bailhache J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House

Lords' Journals, July 30, 1920.

Solicitors for the appellants: *Parker, Garrett & Co.*

Solicitors for the respondents: *Downing, Handcock, Middleton & Lewis.*

[HOUSE OF LORDS.]

H. L. (E.)* 1920 — *Nov.* 26.

OWNERS OF S.S. ALEXANDER SHUKOFF . . . . . } APPELLANTS;

AND

OWNERS OF S.S. GOTHLAND . . . RESPONDENTS.

OWNERS OF S.S. LARENBERG . . . APPELLANTS;

AND

OWNERS OF S.S. GOTHLAND . . . RESPONDENTS.

Ship—Collision—Plea of compulsory Pilotage—Duty of Crew to assist Pilot—Defective Lookout—Failure to report material Incidents.

Where a vessel is put under compulsory pilotage the pilot is entitled to have the assistance of a lookout and a timely report of any material incident, and (per Lord Birkenhead L.C., Viscount Finlay, Lord Shaw of Dunfermline, and Lord Moulton; Lord Sumner not assenting, being

---

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD MOULTON, and LORD SUMNER.

of opinion that the question did not arise for decision) the failure to report cannot be excused on the ground that the pilot could have seen such incident for himself. The pilot in such a case is entitled to the same assistance from the lookout as would in ordinary course be given to the officers in charge of the vessel.

On proof that the master and crew have failed to render the pilot proper assistance, the owner cannot avail himself of the plea of compulsory pilotage as a defence to an action of damage by collision unless he establishes that the neglect of the master and crew did not contribute to the collision.

Decision of the Court of Appeal in the *Alexander Shukoff Case* reversed and decision of Hill J. restored (Lord Sumner dissenting).

Decision of the Court of Appeal in the *Larenberg Case* reversed and decision of Hill J. restored.

THIS litigation arose out of a collision which occurred between the *Alexander Shukoff* and the *Gothland* and a subsequent collision which occurred between the *Larenberg* and the *Gothland* in the South Edinburgh Channel in the Thames shortly before noon on December 4, 1916.

In the first case the owners of the *Alexander Shukoff* brought an action of damage by collision against the owners of the *Gothland* and there was a counterclaim by the owners of the *Gothland* against the owners of the *Alexander Shukoff*. Both parties pleaded compulsory pilotage.

In the second case the action was brought by the owners of the *Gothland* against the owners of the *Larenberg* and there was a counterclaim by the owners of the *Larenberg*. In this case also both parties pleaded compulsory pilotage.

The facts are fully stated in the opinions of the Lord Chancellor, but the following summary may be useful to render the arguments intelligible.

The *Aberdale*, the *Alexander Shukoff* and the *Gothland* were proceeding down the channel in the order named, the *Aberdale* being a good way ahead. The *Aberdale* was signalled by a torpedo boat to anchor and thereupon she swung round and proceeded up the channel to find anchorage. She met the *Alexander Shukoff* and the two vessels exchanged port helm signals and were about to pass port to port, the *Alexander Shukoff* porting her helm half a point to give the *Aberdale* more room. At this juncture the *Gothland*, which was proceeding at a rate of 13 knots, was rapidly overhauling the

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Alexander Shukoff on her starboard quarter, and she suddenly starboarded with a view to passing across the bows of the *Alexander Shukoff*. In the result the port bow of the *Gothland* came into contact with the starboard bow of the *Alexander Shukoff* and considerable damage was done to the latter ship.

The *Larenberg*, which was proceeding down the Thames shortly behind the *Gothland* rather on the port side of the channel, on seeing the *Gothland* steering her course so as to run across the bows of the *Alexander Shukoff*, slowed her engines but did not stop them. After the first collision the *Larenberg* reversed her engines, but the *Gothland* came across her course before she could take all her way off, and as the result the *Larenberg* struck the *Gothland* on her port quarter and seriously damaged her.

Hill J., in the first action, held that the *Gothland* was solely to blame for the collision and, finding as a fact that the master and crew did not report to the pilot the position of either the *Aberdale* or the *Alexander Shukoff*, he held that the defence of compulsory pilotage failed, inasmuch as the pilot had not received from the master and crew the assistance to which he was entitled, and the owners of the *Gothland* had not shown that the neglect of the master and crew was not a contributing cause of the collision. In the second action he held that both vessels were to blame, and apportioned the blame as to two-thirds to the *Gothland* and as to one-third to the *Larenberg*. He also held that the fault on the *Gothland* was not solely that of the pilot but that the fault on the *Larenberg* was solely that of the pilot, and he gave judgment for the owners of the *Larenberg* for two-thirds of the damage sustained and dismissed the claim of the *Gothland*.

The Court of Appeal (Bankes, Warrington and Duke L.JJ.) varied the judgment of Hill J. in each case. In the first case they held that the owners of the *Gothland* were entitled to succeed in their defence of compulsory pilotage, as the pilot was aware of the presence of the *Alexander Shukoff* at a time when he could by the exercise of ordinary skill and care have avoided a collision. In the second case they held that the

Larenberg was alone to blame, but that as the fault was solely that of her pilot the *Gothland* could recover nothing.

The House had the assistance of nautical assessors.

OWNERS OF S.S. ALEXANDER SHUKOFF *v.* OWNERS OF S.S. GOTHLAND.

1920. July 15, 16, 19. *Laing K.C.* and *J. B. Aspinall* for the appellants. The pilot did not receive from the master and the crew the assistance to which he was entitled. The master and crew ought to have reported the presence of the *Alexander Shukoff* and the *Aberdale*, but they failed to keep any proper lookout and gave him no assistance whatever. The duty to report vessels in the way has been laid down in several cases: *The Iona* (1); *The Velasquez* (2); *The Tactician*. (3) The authorities are summed up by the President (Sir Samuel Evans) in *The Benue*. (4) Further, the ship was being recklessly navigated and it was the duty of the master to warn the pilot that he was going much too fast. If there is a proved breach of duty on the part of the master and crew the onus is on those asserting compulsory pilotage to establish that the negligence of the master and crew did not in fact contribute to the loss: see *Clyde Navigation Co.* v. *Barclay*. (5)

Butler Aspinall K.C. and *A. D. Bateson K.C.* (with them *D. Stephens K.C.*) for the respondents. 1. Under the circumstances of this case there was no duty to report. The master was fully justified in thinking that the pilot was seeing that which was obvious. *The Tactician* (3) is the extreme case on this subject, but there the pilot was obviously standing into a special danger. The circumstances of that case do not apply here. The pilot must be under some misapprehension of fact in order to justify the master in warning him. 2. There were ample time and opportunity for the pilot by doing the right thing to have avoided the collision.

Laing K.C. replied.

The House took time for consideration.

(1) (1867) L. R. 1 P. C. 426, 431-435.
(2) (1867) L. R. 1 P. C. 494, 500.
(3) [1907] P. 244.
(4) [1916] P. 88.
(5) (1876) 1 App. Cas. 790, 796.

H. L. (E.)
1920
S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.
S.S. LARENBERG v. S.S. GOTHLAND.

OWNERS OF S.S. LARENBERG *v.* OWNERS OF S.S. GOTHLAND.

1920. July 19, 20. *Laing K.C.* and *Lewis Noad* for the appellants.

Butler Aspinall K.C. and *A. D. Bateson K.C.* (with them *D. Stephens K.C.*) for the respondents.

Laing K.C. replied.

The House took time for consideration.

1920. Nov. 26. LORD BIRKENHEAD L.C. My Lords, it will, I think, be convenient if I read the speeches I have prepared in these matters consecutively, putting the questions, of course, separately from the Woolsack afterwards. I take first the case of the *Alexander Shukoff*.

My Lords, this is an appeal from an order of the Court of Appeal dated 12th February, 1919, reversing a decree of Hill J., dated 17th June, 1918.

The action was brought by the appellants in respect of a collision in the Thames between the steamship *Alexander Shukoff* and the steamship *Gothland* during the morning of the 4th December, 1916. Both vessels carried pilots by compulsion of law. Hill J. held that the *Gothland* was solely to blame and that the defence of compulsory pilotage was not made out. The Court of Appeal, while agreeing that that vessel was solely to blame, held that the defence of compulsory pilotage was made out and accordingly this appeal has been brought.

There was considerable conflict of evidence in the trial Court, and there can be no doubt that Hill J. was right in refusing to accept the explanations and statements of facts offered on behalf of the *Gothland*. The real issue is whether the defence of compulsory pilotage has been established by the owners of that vessel.

The collision in question occurred shortly after 11 A.M. on the 4th December, 1916, in fine clear weather in the South Edinburgh Channel between No. 5 and No. 3 buoys. The learned judge found that the tide was on the ebb between

one and two knots setting south-easterly. The *Alexander Shukoff*, a vessel of 257 feet in length, capable of 8 knots, and the *Gothland*, which is 490 feet long and capable of 13 knots, were among a large number of other vessels which had been at anchor in the Black Deeps, and had obtained permission to proceed. As the North Edinburgh Channel was closed they all had to pass through the South Edinburgh Channel. There were, therefore, at the time a large number of vessels in the vicinity. The entrance to the channel is marked on the port side by No. 5 buoy.

The first ship whose manœuvres require notice is the steamship *Aberdale*, which entered the channel ahead of the other two, and when in mid-channel was ordered by a torpedo boat to anchor instantly. This signal, which was general, was apparently not seen, and was certainly not obeyed by the other ships. The *Aberdale* swung round with her head pointing N.W. and, while she was so heading, the *Alexander Shukoff* was seen about a quarter of a mile away heading in a south-easterly direction a little on the port side of the channel. As she entered the channel she was going about 8 knots. The *Gothland* was seen by the *Aberdale* almost at the same moment as the *Alexander Shukoff*. She was about three-quarters of a mile away heading down channel, in a south-easterly direction, on the starboard quarter of the *Alexander Shukoff* and proceeding at full speed. The *Aberdale* and the *Alexander Shukoff* exchanged port helm signals, and passed port to port, the latter altering her course about half point to starboard for the purpose. The *Gothland* was about a quarter of a mile from the latter vessel and overhauling her when the signals were exchanged. She was on the *Aberdale's* starboard quarter. Both passed the *Aberdale* on courses which though nearly parallel were none the less converging. The evidence given on behalf of the *Gothland* was not evidence of truth, but certain facts are nevertheless established. This vessel was proceeding at full speed in narrow waters among a large number of ships. The pilot was in charge. The master and second officer were on the bridge, the chief officer was on the forecastle

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Lord Birkenhead L.C.

head, and there was a man in the crow's-nest as lookout man.

The pilot stated that he first saw the *Alexander Shukoff* when she was one or two ships' lengths away, and in cross-examination put the distance at 700 feet. No one reported her to him. The master did not see her until they had passed ahead of the ship at anchor, and he said that there were so many ships about that they could not notice anyone in particular. The second officer, who was near him, first saw her when she was about a ship's length off a little abaft the beam, and his observation was so perfunctory that he seems to have thought that she was overtaking the *Gothland*. The chief officer noticed the *Alexander Shukoff* when she was on their port side, perhaps half a ship's length away, at the moment when they were manœuvring to pass round the stern of the ship at anchor, but he obviously did not think it his duty either to keep a lookout or to report. It does not appear whether the lookout saw her but certainly he made no report to any one. Nor was any report made to the pilot as to the *Aberdale*. In these circumstances the *Gothland* continuing to come on, the two ships collided at a fine angle, the starboard bow of the *Alexander Shukoff* coming into contact with the port bow of the *Gothland*. Hill J. held that the *Alexander Shukoff* did nothing wrong, that the *Gothland* was proceeding at a reckless and excessive speed, and did nothing to avoid the collision until it was too late, because no one on board was paying attention to the other vessel. The learned judge did not decide whether it was the duty of the master to interfere having regard to the rate of speed, which in his view made the duty of rendering every possible assistance to the pilot all the greater. This duty, which should have been present to the minds of all the officers, was not discharged at all. In his view, the failure to report a ship which was being overtaken and on a converging course fine on the *Gothland's* bow, left the pilot without proper assistance, and therefore the defence of compulsory pilotage failed.

The Court of Appeal reversed this decision on the ground

first that there was no duty to call the pilot's attention to this particular vessel before the moment when, according to the evidence, the pilot became fully aware of her position, and secondly that at that time the pilot could by the exercise of reasonable care and skill have avoided the accident. The Lords Justices therefore, accepting the advice of their nautical assessors, differed in their view of the facts. On the question of speed, they pointed out that interference with the pilot is only justified in extreme cases, of which this was not one. They therefore held that the defence of compulsory pilotage had been made out.

In cases where such a defence is set up there are two factors which must be taken into account. The first is that this defence, which is of statutory origin and has been repeated in successive Acts of Parliament, is part of the settled policy of the country, and is not to be narrowed or diminished in force by decisions of the Courts. The second is that this rule, which is intended as a measure of security, does not mean, and must not be taken to mean, that a pilot when once he is in charge of a vessel is so circumstanced that the master and crew owe him no duty to inform him of circumstances which, whether he has noticed them himself or not, are material for him to know in directing the navigation of the vessel. The master and crew are not mere passengers when a pilot is on board by compulsion of law. The pilot is entitled to their assistance, and to apply the defence of compulsory pilotage to a case where the accident would have been averted if such assistance had been given, though in fact it was not, would defeat the policy which has created the defence, and so far from increasing the safety of navigation would actually increase its risks. The law has been laid down in a number of cases, though not, I believe, in this House. In *The Iona* (1) the Judicial Committee, after pointing out that it was for defendants to make out the defence and that therefore they must prove not merely that there was fault or negligence on the part of the pilot but that the damage was occasioned exclusively by such default,

(1) L. R. 1 P. C. 426.

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Birkenhead L.C.

proceeded (1) to point out that if the pilot had been made earlier aware of the position of a certain barge the accident might never have occurred. Thus the neglect of duty on the part of the lookout man not only might have been conducive to the disaster but was in all probability the ultimate cause of it. Again, in *The Velasquez* (2), the Judicial Committee laid down the rule in these terms :—

" The cases have clearly established that if, for any act or omission which contributed to the accident, the master or crew is to blame, then, although the pilot is also to blame, the owners are not exempted from liability," and the judgment adds: " That it is the duty of the crew, by means of a sufficient look-out, to give to the pilot the earliest possible information of an approaching vessel, and accurately to describe her position, was the principle enforced in the case of *The Iona* (3) ; and in the present case it may reasonably be inferred that if the pilot had received earlier information of the barque . . . . he would not have given the order to starboard at all, *or would have given it at a time when on a starboard helm he could have gone clear of the barque.*" In *The Tactician* (4) Lord Alverstone C.J. stated the rule in these terms : " The cardinal principle to be borne in mind in these pilotage cases . . . . is that the pilot is in sole charge of the ship," and he expressed his agreement " with the opinions of the very learned Judges, from Dr. Lushington downwards, ... as to the danger of a divided command, and the danger of interference with the conduct of the pilot ; and that if anything of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage. . . . . But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out, and a well-found ship. . . . . The cases in which the master has to interfere at all with the pilot very rarely occur, but . . . . there is, or may be, a distinction between interference and bringing to the pilot's notice anything which

(1) L. R. 1 P. C. 435.
(2) Ibid. 494, 498, 500.
(3) Ibid. 426.
(4) [1907] P. 244, 250.

the pilot ought to know. The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important that he should know."

It must be borne in mind that, as Lord Selborne pointed out in *Clyde Navigation Co.* v. *Barclay* (1), there are three things necessary to be proved : first, that a qualified pilot was acting in charge of the ship ; secondly, that the charge was compulsory ; and thirdly, that it was his fault or incapacity which occasioned the damage.

Your Lordships have to apply these principles to the facts of this case. If the pilot, having received timely information of the position of the *Alexander Shukoff* and the *Aberdale*, acted so negligently as to cause the collision, there can be no doubt that the fault would be his alone. The evidence establishes clearly that so far from receiving such information in time he was given none at all. In circumstances which called for the greatest care and fullest assistance he was left to his own observation. It is obvious from his own explanation that he was not fully aware of the position and intentions of both vessels at the time of the collision. It may be (though I am not satisfied upon this point) that he ought to have been aware, but a pilot's duty is that of controlling the navigation of the ship and his attention must at times be concentrated on some particular fact. He is entitled to have the assistance of a lookout and timely reports of material incidents. He is in charge, but he is not in charge without assistance. If that assistance is not forthcoming it is difficult, if not impossible, for the owners to say that the pilot ought to have known without being told and therefore that the blame is his alone, for this reason that it by no means follows that, if the pilot had been informed, as he should have been, of the respective positions of the two vessels at a time when a report ought to have been made, he would have acted as he did. When he first saw the *Alexander Shukoff* he was only a short

(1) 1 App. Cas. 790, 796.

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Lord Birkenhead L.C.

distance away, and he was committed, at a late period in the development of events, to a course which, as events proved, brought his vessel into collision with her. Had a proper lookout been kept and had information been given him in time, he would not have been placed in a position in which he found himself forced to come to a swift and peremptory decision, whether to hold on or to alter his course. Even although at the actual moment of decision, the collision might have been avoided if he had acted differently, it cannot be said that he would have found himself obliged to come to an instant decision at that moment and in those circumstances if he had received the assistance to which he was entitled. There is also another consideration which must have considerable weight—namely, that the pilot was navigating the ship at full speed in narrow waters among a large number of vessels. It cannot be contended that in this case it was the master's duty to take the vessel out of the pilot's charge, but the course taken was such that it must have been obvious to the master either that the pilot did not know of the risk to which he was subjecting the ship or that if he did know he was undertaking an unwarrantable risk. The master owed a duty to his owners and to the pilot to call the pilot's attention to the risk so that the latter might have his attention directed to the danger that was imminent unless more care was taken. Yet the master did nothing.

Your Lordships have to decide whether in these circumstances the respondents have established that the collision was due solely to the fault of the pilot. In my opinion they did not discharge that onus, but on the contrary there was neglect on the part of the master and crew of the *Gothland* which cannot be shown to have been unconnected with the collision.

I now turn to the case of *The Larenberg*.

My Lords, this appeal is concerned with a collision between the steamship *Larenberg* and the steamship *Gothland*, which took place very shortly after the collision between the latter

vessel and the steamship *Alexander Shukoff*. It is unnecessary to recapitulate the facts up to the time of the first collision, as I have already fully stated them in my speech in that case. The steamship *Larenberg* is a vessel of 326 feet in length and at the material time was in ballast. At the moment she entered the South Edinburgh Channel she was following the *Alexander Shukoff* and ahead of the *Gothland*, but before the first collision the latter ship had passed her, and but for that collision, the events which happened could not have taken place. At that time the *Larenberg* was astern of the other two vessels and further over to the east side of the Channel. The *Gothland's* case was, shortly, that, after the first collision was over, she was again on her down channel course when she had to manœuvre for a vessel at anchor, and the *Larenberg* overtaking her failed to keep out of her way. The case for the *Larenberg* is that as a result of the collision the *Gothland* came across the course of the *Larenberg* which had slowed down before the first collision and had reversed about the time that event took place, and that in consequence of the *Gothland's* coming across the *Larenberg's* course she collided with the latter before that vessel had lost all her way.

The evidence was very conflicting, and Hill J. accepted the evidence of the *Larenberg's* pilot with one exception. This witness's evidence was that the *Larenberg* was following the *Alexander Shukoff* at about the same speed and when squared up in the channel was about 500 or 600 feet off on the port quarter. The *Gothland* approached the *Alexander Shukoff* from the southward towards the east and the first collision took place when the *Larenberg* was about 300 feet behind the *Shukoff*, still on her port quarter. Before that collision the *Larenberg's* pilot slowed his engines and went inside No. 5 buoy and at the time of that collision his engines were going slow. After the collision the *Gothland* passed ahead of the *Alexander Shukoff* across her bows, being on a starboard helm. The *Larenberg* at the time of that collision went full speed astern and the *Gothland* also was going astern, with the result that the *Larenberg's* stem came into contact

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Lord Birkenhead L.C.

at right angles with the port side aft of the *Gothland*, which had by then stopped her engines. The place of this second collision was near No. 3 buoy. The witness estimated that three minutes elapsed between the two collisions. He was of opinion that the *Gothland* could have avoided the *Larenberg* without getting into shoal water by going ahead on her port engine. As the learned judge pointed out the *Larenberg* was only 100 yards behind the *Gothland* when the first collision occurred, and the place of the second collision was only about 500 yards away from the spot where the former occurred, and therefore the *Larenberg's* engines cannot have been reversed so soon as the witness said and consequently not so soon as they ought to have been.

The *Gothland's* pilot attributed his actions to the need for avoiding a vessel at anchor right across the channel. It is a remarkable circumstance if this were the case that he did not notice her until after the first collision; the omission means that he did not observe a vessel anchored right across his course in a narrow channel along which he was proceeding at full speed. Nor do the other witnesses appear to have seen this vessel. It is obvious that the pilot was seeking for an excuse but, even if this vessel was where he places her, the excuse will not avail, as he ought to have seen her before and, moreover, he did not know, nor was he informed, that he was bringing his ship across the *Larenberg's* course. The evidence for the *Gothland* was conflicting and difficult to understand. It is not remarkable therefore that the learned judge found it impossible to reconcile this evidence with the known facts. He found both vessels to blame, but held that the *Gothland* was not, but that the *Larenberg* was, protected by the defence of compulsory pilotage. The Court of Appeal, while agreeing that the position of the *Gothland* was due to the negligence of those placed in charge of her, was nevertheless of opinion that the *Larenberg's* pilot could have avoided the *Gothland* if he had exercised proper care and skill, and therefore held the *Larenberg* solely to blame. As, however, the Court held

that the negligence was that of the pilot who was in charge by compulsion of law they gave effect to the defence of compulsory pilotage. From this decision the *Larenberg* has appealed to your Lordships' house. In coming to a decision upon these facts it is important to observe that the *Larenberg* should have reversed her engines at the very moment of the first collision, as, indeed, her pilot claimed that she did. It is impossible in this respect to acquit her of an act of negligence, which probably led to the collision and certainly made the shock more severe than otherwise it would have been. The *Gothland* was also negligent not only in respect of the earlier collision but also by not taking proper steps to clear the *Shukoff* and avoid coming across the Channel. Had she not come across in continuing negligence the second collision would have been avoided. It is clear that the master and crew of the *Gothland* did not report the *Larenberg* to the pilot, who, according to his own story, did not know of her until, hearing a shout from her, he saw her about half a ship's length away. This conduct shows that the pilot and the master and crew were guilty of negligence right up to the time of the second collision. This is not in my view the simple case of a vessel which was negligent but whose negligence was not the cause of the accident. In this case the *Gothland* had by negligence got into a position which contributed greatly to the second collision. It was her duty to do all that she could to prevent any untoward result of that negligence. She failed in that duty, and it is impossible to say that in those circumstances she has proved that the blame must be placed solely upon the *Larenberg*.

Both vessels are therefore to blame, but in the case of the *Larenberg* the defence of compulsory pilotage is established. The *Gothland* cannot avail herself of that defence. As I have already stated, the first collision was a cause which contributed to the second, and, on the facts, the master and crew failed in their duty in that case. They also failed in their duty to keep a proper lookout and keep the pilot informed after the first collision. The result

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

is that the order of the Court of Appeal must be reversed and the decree of Hill J. restored.

VISCOUNT FINLAY. My Lords, I will read first my judgment in the case of the *Alexander Shukoff*. (1)

My Lords, the appellants in this case, the owners of the *Shukoff* steamship, brought an action against the respondents, the owners of the *Gothland* steamship, for damage sustained by them in a collision between the two vessels which occurred in the South Edinburgh Channel in the Thames on December 4, 1916, shortly before noon. There was a counterclaim by the owners of the *Gothland*. The case was tried before Hill J. sitting with the Elder Brethren. He decided that the *Gothland* was solely to blame and that the defence of compulsory pilotage failed. The Court of Appeal agreed that the *Gothland* was solely to blame, but held that the defence of compulsory pilotage had been established. The only question on the present appeal is as to the defence on the ground of compulsory pilotage. The *Gothland* was under compulsory pilotage, but Hill J. held that the master and crew were also to blame for the collision on the ground that they had failed to report the *Shukoff* to the pilot and that this default had contributed to the collision. With regard to the contention that the master of the *Gothland* ought to have interfered with the pilot on the ground that the speed at which he was going was excessive and reckless, Hill J. thought that it was unnecessary for him to express any opinion. The Court of Appeal reversed the decision of Hill J. on the question of compulsory pilotage. They held that the collision was solely the fault of the pilot on the ground that he was aware of the presence of the *Gothland* in time to prevent the occurrence of the collision by the exercise of reasonable care and skill, and that no case had been made out to show that the master ought to have interfered with the pilot.

The *Shukoff* was proceeding down the South Edinburgh Channel, and at the same time a considerable number of

(1) Afterwards in this judgment referred to for shortness as the *Shukoff*.

other vessels which had been detained in the Black Deep and its vicinity and had received permission to put out to sea were also proceeding in the same direction. One of these ships was the *Gothland*, which had a speed of 13 knots as against the 8 knots of the *Shukoff*. Those on board the *Shukoff* first noticed the *Gothland*, according to their preliminary act, about half a mile distant astern and on the starboard quarter of the *Shukoff*. A steamship called the *Aberdale* had been proceeding down the river a good way ahead of the *Shukoff*, when she was signalled by a torpedo boat to anchor at once. The *Aberdale* turned round in the channel in order to pass up to the Black Deep for anchorage. She met the *Shukoff*, which was coming down, and the two vessels were about to pass one another port to port. They had exchanged signals for that purpose, and the *Shukoff* had ported half a point. The *Gothland* was overtaking the *Shukoff*, and for some reason starboarded and attempted to pass between the stem of the *Shukoff* and the stem of the *Aberdale*, these vessels being then at no great distance from one another. The port bow of the *Gothland* struck the starboard bow of the *Shukoff*, doing a good deal of damage. The pilot of the *Gothland*, when asked in cross-examination why he did not port so as to pass clear of the *Shukoff*, gave as his excuse for not doing so that there was a vessel on his starboard bow a little further down the Channel which made this impossible, but there is no confirmation of this statement, and it cannot be accepted.

No report was made by the lookout or officers on board the *Gothland* to the pilot as to the presence either of the *Shukoff* or of the *Aberdale*. It appears from the evidence that no reports whatever were made on board the *Gothland* of any ships in the Channel. It is said that there were so many ships that such reports would have been useless, as the pilot could see the vessels himself, and that reports might have distracted his attention from the proper discharge of his duties. I quite agree that at some points in the Thames, owing to the multitude of shipping, it must be impossible to report every vessel, and that to attempt to do so might be

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S. S. GOTHLAND.

Viscount Finlay.

mischievous. It is, however, impossible to justify the course which those on board the *Gothland* followed in reporting nothing at all. From time to time there must be cases in which a report is desirable even in so crowded a river if a vessel is in such a position as to call for some action on the part of the pilot in charge. Even if the pilot can see the vessel himself his attention may for the moment have been diverted elsewhere and a report would ensure that he becomes aware of a possible source of danger.

Hill J. found that there was default on the part of the master and crew of the *Gothland* in not reporting the *Shukoff*, as the *Gothland* overhauled her, and that this contributed to the collision. But the Court of Appeal found that the pilot of the *Gothland* was perfectly aware of the presence of the *Shukoff* in time to enable him to avoid her, and that the fault was absolutely his. I should not be prepared to hold that the failure to report the *Shukoff* contributed to the collision. The *Gothland* had been overhauling her for some time, and it is obvious that the statement of the pilot that he saw her himself is true. He undertook the somewhat risky manœuvre of taking his vessel across her bows, trusting no doubt to the superior speed of the *Gothland* to carry him through this manœuvre in safety.

But the failure to report the *Aberdale* stands on a very different footing. The pilot states that he did not notice the *Aberdale*. Her presence proceeding up the channel a little on the port bow of the *Shukoff*, which was coming down, and at no great distance from her, was a matter which certainly should have been reported to the pilot. It may be that the pilot was not speaking the truth when he said that he did not see her. Indeed some of his evidence was of such a character that it is impossible to attach much importance to any unsupported statement of his. But it is quite possible that he is speaking the truth in this instance. His attention may have been concentrated on the *Shukoff*, across whose bows he was about to take the *Gothland*. The appearance of the *Aberdale* proceeding up channel after she had turned was a new phenomenon which ought to have been reported

so as to call the pilot's attention to her. Her presence in that position was a most material element in determining as to the propriety of attempting to cut across the bows of the *Shukoff*.

In my judgment it is impossible to accept the proposition that there is no duty to report anything that the pilot can see for himself. The fact that the master or officer in charge of the ship can see an object does not excuse the failure of the lookout to report it. Apart from the fact that two pairs of eyes are better than one the attention of the officer in charge may have been for the moment turned in some other direction. The pilot is there to take charge of the ship, and in doing so he is entitled to the same assistance from the lookout as the master or officer would in ordinary course receive. I think that the failure to report the *Aberdale* under the circumstances was inexcusable. The principle on which the master and crew of the *Gothland* acted that they need report nothing on the ground that the pilot, if he uses his eyes, could see for himself, is at once novel and dangerous. The attention of the pilot ought to be called by a proper lookout to the appearance of anything which should be taken into account with reference to the proper navigation of the ship. If, in the present case, his attention had been called to the presence of the *Aberdale* it might have led him to think twice before he attempted to cut in across the *Shukoff's* bows between her and the *Aberdale*.

It was alleged on behalf of the *Shukoff* that the speed of the *Gothland* was reckless, and that it was the duty of the master at least to give some warning to the pilot on this score. The *Gothland* was going at 13 knots, and there was a great deal of shipping about, but, on the other hand, it has been urged that with a good speed the vessel answers to her helm more readily, and therefore that the speed really made for safety. The question of speed is a matter for the pilot in charge of the ship, and it might be productive of danger if your Lordships laid down any rule of conduct which might appear to encourage interference with the pilot. Except in extreme cases, and under very special circumstances, unasked

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Viscount Finlay.

advice might rather tend to worry and distract the pilot in the discharge of his very responsible duties.

I agree with the Court of Appeal that no circumstances existed in the present case which called for any interference by the master of the *Gothland* whether in the way of advice or otherwise. Hill J. expresses no opinion upon this point.

But on the ground which I have already stated—failure to report by the lookout—I think that the collision cannot be held to be the fault exclusively of the pilot and that the defence on the ground of compulsory pilotage of the *Gothland* fails, and I think, therefore, that the judgment of the Court of Appeal must be reversed.

My Lords, I now proceed to read my judgment in the case of the steamships *Larenberg* and *Gothland*.

The *Larenberg* is a Dutch steamer of 3625 tons gross, and she came into collision with the *Gothland* within a few minutes after the collision between the *Gothland* and the *Shukoff*. An action for damage was brought by the owners of the *Gothland* and there is a counterclaim by the owners of the *Larenberg*.

Hill J. found that both ships were to blame, the *Gothland* to the extent of two-thirds and the *Larenberg* to the extent of one-third, but in the case of the *Larenberg* he held that the defence of compulsory pilotage had been established. The Court of Appeal held that the *Larenberg* was solely to blame and that the defence of compulsory pilotage was made out.

In this case it appears to me that Hill J. was right in finding that both the *Larenberg* and the *Gothland* were to blame. The *Larenberg* came down the South Edinburgh Channel behind the *Gothland* and more to the east. She had the *Gothland* on her starboard bow. She was under a compulsory pilotage, and the pilot, apprehensive of danger ahead from what he saw of the behaviour of the *Gothland*, put her inside No. 5 buoy, so as to pass down with that buoy on his starboard side, and slowed down his engines. He witnessed the collision between the *Shukoff* and the *Gothland*, and says that he at once reversed his engines. The *Gothland*,

after the collision with the *Shukoff*, angled off towards the shoal water to the east of the channel. She was so angling across, abreast of No. 3 buoy, when the *Larenberg* came down the channel, and, going at about 4 knots, struck her on the port quarter nearly at right angles.

We are advised by our nautical assessors that if the engines of the *Larenberg* had been reversed immediately when the first collision—that of the *Shukoff* and the *Gothland*—took place, the collision between the *Larenberg* and the *Gothland* would in all probability not have happened at all, or, at all events, that the violence of the blow would have been much less than it was. This advice is in accordance with that given by the Elder Brethren in the Admiralty Court, and I think that we should act upon it. The *Larenberg*, therefore, must be held to blame. As regards the *Gothland*, she clearly was in fault with regard to the second collision, as she had been with regard to the first. The fact that she was angling across the channel in the manner I have described was due in the first instance to her own negligence which brought about the collision with the *Shukoff*. I am further of opinion that there was negligence on the part of the *Gothland* after the first collision in two respects. Her lookout was again defective. Those on board her were unaware that the *Larenberg* was coming down the channel until she was close upon her, and, in my opinion, if they had been so aware the *Gothland* could, by porting, have got out of the way of the *Larenberg*. For these reasons I think the judgment of Hill J. that both vessels were to blame was right.

Both the *Larenberg* and the *Gothland*, however, raised the defence of compulsory pilotage. In the case of the *Gothland* that defence must fail, as the master and crew failed to report the *Larenberg*, and therefore the fault of the negligence subsequent to the first collision cannot be imputed solely to the pilot, and it was by the failure of the lookout on board the *Gothland*, as well as by the default of the pilot, that the first collision had taken place, bringing the *Gothland* into the way of the *Larenberg*. The *Larenberg* was also under compulsory pilotage, and there is nothing in her case to show

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Viscount Finlay.

that any blame can be thrown upon the master and crew, so that that defence in her case is established.

The decision of the Court of Appeal that the *Larenberg* was solely to blame for this collision proceeds, in my opinion, upon a misapplication of the doctrine acted upon in the case of *The Sans Pareil*. (1) The principle of law applied in the *Sans Pareil Case* is very old. In that case it was held by the Court of Appeal that the tug with a vessel in tow was guilty of bad seamanship and negligence in keeping her course and speed so as to cross in front of the Channel Fleet, which was proceeding up the channel. The Court of Appeal, however, held that that initial negligence on the part of the tug was not really part of the effective cause of the subsequent collision, which was solely due to the manner in which the *Sans Pareil*, one of the vessels of the Fleet, was handled.

It is often a question of great nicety whether the negligence of the plaintiff was in the transaction itself or occurred at an earlier stage of the history. In the case of *The Sans Pareil* it was held that it was not really part of the incidents of the collision itself but was entirely antecedent. In the present case it seems to me clear that the negligence of the *Gothland* was in the transaction itself which immediately led to the collision, and that the ordinary rule of contributory negligence is applicable.

I therefore think that in this case judgment should be entered that both vessels were in fault but that the *Larenberg* is exonerated on the ground of compulsory pilotage.

LORD SHAW OF DUNFERMLINE. My Lords, in these cases I desire to say to your Lordships that in the course of considering them I was favoured with a perusal of the judgments of Lord Finlay, and I so entirely concur in the statement of the facts of those cases by my noble and learned friend, and in the verdict and reasons for which he has pronounced it that I felt it not to be incumbent upon me even to presume to add or vary his opinion.

I make this exception, only to pronounce one single

(1) [1900] P. 267.

sentence, and it is in reference to the case of *The Alexander Shukoff*.

My Lords, when a ship is put under compulsory pilotage it is no doubt true that the entire control of her movements is under the command of the pilot so charged with the vessel. It is not however in any sense true that the pilot is thus charged with a vessel deprived of the ordinary and proper services of her crew. It would be a strange result if it were so. The testing instance is the case of the man on the lookout. His responsibility as the servant of the vessel remains, and if there were degrees in such a case it is of course specially acute when the vessel is under compulsory pilotage. If it were not so the situation in law would indeed be peculiar, because it would place the pilot, who presumably is in a position where exceptional skill and knowledge are required for the navigation of the vessel, in a situation in which he had to render those services to it deprived of the ordinary and elementary facilities for navigation which are afforded by the active and vigilant services of the man on the lookout.

My Lords, I do not think the law countenances either such a reasoning or such a grotesque result. If such services are not rendered and this materially contributes to the collision the ship will fail to obtain a quittance of liability by reason of the compulsory pilotage. I have that fully in view when I pronounce my adherence to the views given by my noble and learned friend.

Lord Moulton. My Lords, I will give my opinion first in the case of *The Alexander Shukoff*.

The litigation in this case and in the associated case of the owners of the steamship *Larenberg* against the same defendants, arises from two collisions which took place in the Thames on the morning of December 4, 1916.

The vessels concerned had been at anchor through the night in the Black Deeps in company with a considerable number of other vessels which were waiting for daylight to proceed down the South Edinburgh Channel on their respective voyages. The *Alexander Shukoff* was an iron

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Moulton.

steamship somewhat over 250 feet long, and was proceeding to Dunkirk laden with a cargo of coals, and was at the time moving with a velocity of about 8 knots through the water. The *Gothland*, which was a much larger vessel, about 490 feet in length fitted with twin screws, was starting on a voyage to New York. At all material times her engines were working full speed ahead and she was making about 13 knots. Both vessels were under compulsory pilotage.

The case is complicated by the circumstance that the Courts below have come to the conclusion (and in my opinion rightly) that the case set up on behalf of the *Gothland*, mainly on the evidence of the pilot of that vessel, cannot be relied upon in any way, and it is indeed in its important features obviously fictitious. Nevertheless the circumstances of the actual collision are not difficult to arrive at. The *Alexander Shukoff* was originally coming down the channel considerably in advance of the *Gothland*, which would appear to have been delayed somewhat in her course by having to pass round a vessel lying much higher up in the channel. Inasmuch as the *Gothland* was going at the high speed of 13 knots an hour, it rapidly overtook the *Alexander Shukoff*. If any reliance is to be placed on the evidence of the pilot of the *Gothland*, the time at which he first became aware of the *Alexander Shukoff* as a ship to which he had to pay attention, was when she was a little forward of his port beam and about 700 feet away. I can see no reason for doubting the substantial accuracy of these figures. They are not essential to the decision of the case.

Some little time before this, the steamship *Aberdale* had been passing down the channel much in advance of the other two vessels, having started considerably before either of them. But she had met a torpedo boat, which promptly directed her to anchor. Instead of anchoring on the spot, the *Aberdale* turned round in the channel and proceeded to pass up it towards the north-west before coming to an anchor. In so doing she became aware of the *Alexander Shukoff* ahead of her and coming down the channel on her port bow, and exchanged port helm signals with her, in

consequence of which the *Alexander Shukoff* quite properly altered her course slightly to starboard.

The position of the three vessels therefore at the moment when it is necessary to consider them, was that the *Gothland* was proceeding at a speed of 13 knots down the channel, the *Alexander Shukoff* was also proceeding down the channel at about 8 knots an hour on an almost parallel course nearly level with the *Gothland* but lying about 700 feet on her port side. The *Aberdale* was lying still further to the north-eastern side of the channel, and was coming up the channel and about to pass the *Alexander Shukoff* port to port.

It was when the three ships were in these positions relative to one another that the *Gothland* undertook the extraordinary manœuvre which led to the accident. It attempted to pass the *Alexander Shukoff* by shooting across its bows. Even if the *Aberdale* had not been there this would have been a sufficiently improper manœuvre, but inasmuch as the *Aberdale* was coming up the channel to pass on the further side of the *Shukoff*, it seems almost incredible that the pilot could have adopted such a rash and dangerous course if he had been aware of the position and movements of the *Aberdale*. It is evident that the pilot of the *Gothland* in trying thus to rush across the bows of the *Alexander Shukoff* must have starboarded and gone full speed ahead. In spite of his great speed he failed to clear, and his port bow collided with the starboard bow of the *Alexander Shukoff*, and this is the collision with which we are concerned in this case. So soon as it occurred the *Gothland* was obliged to stop and reverse, no doubt in order to prevent her getting into trouble with the *Aberdale* and also to allow the latter to continue on her course up the channel. The pilot's own statement is that he did it to avoid a small steamer which he had not previously noticed and which lay in mid-channel. But there is no ground for believing the truth of this statement, unless it refers to the *Aberdale* itself.

That the collision was due to the improper navigation of the *Gothland* is clear beyond dispute. Indeed, it has been "practically conceded" (to use the words of the judge at

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Moulton.

the trial) "throughout." The defence relied upon by the owners of the *Gothland* is that of compulsory pilotage—namely, that the collision was wholly the fault of the pilot. If this is established, the plaintiffs' case fails. But we must bear in mind that the fact that the pilot was guilty of negligence in directing the movements of the vessel is not sufficient by itself to establish such a case.

The further question arises whether those on board the ship had given to him the assistance which he was entitled to receive from them in order to enable him to fulfil his duty. I am content to accept the law on this point as laid down by the President of the Court of Appeal in his judgment in this case: "The Pilot is entitled to the fullest assistance from the officers and crew of the vessel of which he is in charge by compulsion of law and that assistance includes the keeping of a good look-out so that the Pilot should be informed of the position and movements of and possible danger to other ships."

We must ask ourselves, therefore, whether in this case the pilot received this assistance from the officers and crew of the *Gothland*. The evidence shows clearly that he received from them no such assistance at all. Nothing was reported to him by them from the beginning to the end of the history. He was left entirely to his own unaided observation. This is the finding of the learned judge at the trial, and it is not differed from by the Court of Appeal, and I agree with it entirely. Indeed it is not denied by the defendants.

The real defence set up by the defendants is not that this duty was in fact performed by the master and crew of their ship, but that it would have made no difference if it had been performed. They say that the pilot either knew all that they could have reported to him, or that if he did not know it, he ought to have found it out for himself. The first alternative in this excuse is negatived by the evidence. The pilot states that he had not become aware of the existence of the *Alexander Shukoff* until a late stage, and he excuses himself for this by saying: "I was too much engaged noticing my own ship to take notice of the other." And so far as the

evidence shows, he was never aware of the proximity of the *Aberdale* or that it was travelling up the channel on its way to pass the *Alexander Shukoff* port to port until after the collision. Both these facts were matters of prime importance which should have been reported to him.

The second alternative in the excuse is at once more specious and more dangerous. The defendants say that the pilot ought to have found out these things for himself and that therefore they are excused from having omitted to report them to him. Now it must be remembered that the pilot has many things to think of, especially where, as in the present case, he is leaving the port in company with other vessels, and new incidents may at any moment arise. He needs, therefore, to be in a position of feeling that he can give his whole attention to his duties of management secure that all relevant occurrences will be duly reported to him. No doubt one of his duties is to observe that which is going on around him, but compulsory pilotage is not a case where the law intends that the pilot shall double the roles of captain and crew and "look-out." When the matter relates to vessels or occurrences within the sphere of that which may reasonably influence the action of the pilot, it is, in my opinion, no adequate excuse to one whose duty it is to report that he thought that the pilot ought to discover it without his assistance.

Let me examine for a moment the issue that we are deciding. It is a severe, but no doubt a just, law that says that a shipowner whose ship has been damaged through the careless navigation of another ship shall have no redress in the case of compulsory pilotage, if the accident be due solely to the negligence of the pilot. But the law does not unconditionally shift the responsibility of a ship and crew to the shoulders of one man. To justify the application of the law, the pilot must be a duly instructed pilot. The master and crew of the ship are not freed from their obligations of watchfulness and proper service, but the recipient of these services is now the pilot, and the condition of the owner receiving the benefit of the provision is that his master

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

Lord Moulton.

and crew should have fulfilled these obligations in all material respects. It is for this reason that I scrutinise so closely such suggestions as that: "Although I ought to have reported the matter to the Pilot, yet he ultimately found it out himself, or ought so to have done in time to enable him to avoid the accident."

This is not a question of negligence between two ships which are equally responsible for their own proper navigation, but a question whether the owner of a ship is entitled to benefit by the provision which relieves him from liability on the ground of compulsory pilotage. He does not earn the exemption if he has not performed the part incumbent on him. If it was the duty of his master and crew to report and they did not do so, he is not entitled to excuse himself in the way suggested, for it may well be that if notice had been duly given to the pilot at the proper time, he would never have permitted the ship to have got into the difficulties from which he failed to extract himself. In such a case, the owner would not, in my opinion, be entitled to the benefit of the provision, because he would have failed, in a material respect, to fulfil the fundamental condition of his exemption from liability.

Speaking for myself, I look in vain for any excuse for the master and the crew of the *Gothland* having thus wholly made default in their duty to report to the pilot; more especially in respect of the presence and position and movements of the *Alexander Shukoff* and the *Aberdale*. The excuse of the master is: "There were so many ships under way as a matter of fact that we could not notice any one ship in particular." This excuse comes badly from the mouth of one whose ship is coming through this alleged crowd of ships at a speed of 13 knots. But I do not believe this statement of the master. There might have been other ships in the neighbourhood, although there is no evidence of it, but these must in general have been ships with which the *Gothland* had no concern, while both the *Alexander Shukoff* and the *Aberdale* were ships of which she was bound to take particular notice, not only at the moment of the manœuvre, but even before.

The opinion of the learned judge at the trial was not only that the collision was due to the negligence of the *Gothland*, but that this default on the part of the master and crew to give to the pilot the assistance he had a right to demand from them is fatal to the plea of compulsory pilotage which the defendants have set up. I am in entire agreement with this decision, and am therefore of opinion that this appeal should be allowed and the judgment of the learned judge at the trial restored and that the appellants should have their costs here and in the Court below.

There is another consideration which I have not allowed to influence me in arriving at the conclusion that the plea of compulsory pilotage is not made out, because it is not necessary to enable me to arrive at that conclusion. But it is a matter which comes into such prominence in this case and, in my opinion, is one of such importance, that I cannot refrain from dealing with it.

When the pilot of the *Gothland* starboarded to rush across the bow of the *Alexander Shukoff* and thus got himself into difficulties with the advancing *Aberdale*, the chief officer of the *Gothland*, who was standing by him on the bridge, must have been aware of the danger that he was thus recklessly incurring. In my opinion, it was the duty of the master to call the pilot's attention to the danger that he was thus voluntarily running. In saying this, I am not suggesting that such a crisis had arisen as to justify the master in taking the ship out of the control of the pilot, although it is settled law that in very extreme cases it is his duty so to do. But short of cases such as that, there must be many cases in which the action of the pilot is so obviously dangerous to the safety of the ship that it is the duty of the master to call the pilot's attention to it. It may be that the pilot has failed to perceive something gravely affecting the course he ought to take, or that he has failed to interpret rightly what he has seen. Whether omissions such as this are the cause of a dangerous manœuvre, or whether it is the wilful or perverse choice of the pilot, is a matter which the master cannot decide. Therefore, where, as in the present case, a very serious and

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Moulton.

glaring risk is being run for no apparent justification, it may well be, and I think it was in this case, the duty of the master to call the pilot's attention to the risk he is running, so as to prompt him to reconsider his course of action. I fully realize the absolute authority of the pilot and the importance of not interfering with him, but it is, in my opinion, no more an interference with his authority to call his attention to such a matter in a proper case than it is an interference with him to tell him of something which he might himself have seen but may have allowed to pass unnoticed. The case where a master is bound thus to point out to a pilot the risk he is running will be rare, because it is manifestly the wiser course to refrain from so doing in ordinary cases. Whether any particular case comes within the class where the master is justified or bound to call the pilot's attention to the matter, so that he may reconsider his action, must be a matter of judgment in the circumstances of each case, but personally I think that in the present case the master ought to have done so, and that, if he had so done, the collision would probably have not occurred.

I will now give my judgment in the case of *The Larenberg*.

My Lords, the collision which has given rise to this litigation is closely connected with the collision between the *Alexander Shukoff* and the *Gothland*, which has been dealt with by this House in the judgment which has just been delivered.

The *Larenberg*, which was a steamship of the length of 326 feet, was coming down the South Edinburgh Channel light—so light in fact that its propeller was half out of the water—a little behind the other two vessels and further over to the east side of the channel.

The judge who tried the case found the facts as follows: That the *Larenberg* saw the *Gothland* steering its course so as to run across the bows of the *Alexander Shukoff* and, being afraid that there would be trouble between them, slowed his engines, but did not stop them. She was about 100 yards behind the *Alexander Shukoff* at the moment of the first collision. Some little time after the first collision the

Larenberg reversed its engines, but the *Gothland* came across her course before the *Larenberg* had succeeded in taking off all her way, and thus the *Larenberg* struck the *Gothland* on her port quarter and did her serious damage. Under these circumstances the learned judge held both vessels to blame, apportioning the blame as to two-thirds to the *Gothland* and one-third to the *Larenberg*. The negligence of which he found the *Larenberg* guilty was that she should have reversed her engines earlier, and at least as soon as the first collision. He says: "The Pilot of the *Larenberg*, having the colliding *Alexander Shukoff* and *Gothland* so close and so fine on the bow, had no business to speculate as to how the *Gothland* would clear and he ought to have appreciated the risk of not at once taking off his way and ought to have reversed at once. If he had, the collision would most probably not have happened and certainly the blow would have been much less severe."

With regard to the *Gothland* he finds that the negligence which caused the first collision was a contributing cause to the second collision.

I agree with the judgment of the learned judge that both vessels were to blame. I am unwilling to differ from his view that the *Larenberg* was to blame for not reversing earlier, and with regard to the *Gothland* I am of opinion not only that her negligence in bringing about the earlier collision contributed to the second, but I am also of opinion that she made no effort to extricate herself from the position in which the collision left her, excepting by allowing herself to get across the channel down which the *Larenberg* was coming, and that this itself was a continuing act of negligence which contributed to the second collision. Her pilot was primarily responsible for this, but it was no doubt partly caused by the negligence of the master and crew of the *Gothland* in not making any report to their pilot, who says that he saw nothing of the *Larenberg* until he heard a shout from her and found that she was close on his port quarter, not half a ship's length away.

For these reasons I agree with the judgment of the judge

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Moulton.

at the trial that both vessels were to blame, but the Court of Appeal has varied this judgment and has held the *Larenberg* alone to blame, although the misconduct of the *Gothland* was unquestionably the cause of the whole trouble. The Court of Appeal has done so on the ground that they are advised by their nautical assessors that if the pilot of the *Larenberg* had acted as he ought to have acted when he realized the danger this collision would not have occurred, and that this is sufficient to make the *Larenberg* solely to blame.

I differ fundamentally from this proposition. It entirely puts out of consideration the conduct of the *Gothland* which made no effort to extricate herself from the position in which the collision left her, so as to avoid the collision with the *Larenberg*. Her not doing so was a continuing act of negligence leading up to the collision, and I lean to the belief that if the *Gothland*, after the collision, had ported down the channel so as to get into a course parallel with that of the vessels that were also running down the channel, including the *Larenberg*, the same consequences would have followed as those which the judge at the trial considers would have followed if the *Larenberg* had reversed its engines earlier —namely, that the collision would most probably not have happened, and certainly the blow would have been much less severe.

There is great danger of misapplying the doctrine for which *Radley* v. *London and North Western Ry. Co.* (1) is quoted as an authority. The language sometimes used by the Courts on this point would seem to imply that a ship guilty of the initial negligence is relieved from all responsibility and that the other ship alone has to bear the task of avoiding the consequences and that if she could have done so by proper navigation, she is solely to blame. This is not the true rule. The ship guilty of the initial negligence remains bound to do everything that she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of the other ship is the sole cause of the accident. Otherwise, we should

(1) (1876) 1 App. Cas. 754.

be putting a premium on taking the initiative in negligence. In the present case, the *Gothland* continued to be negligent until the moment of the collision with the *Larenberg*, and thereby aggravated if she did not wholly cause the danger, and although the *Larenberg* was also negligent, she must share the blame.

The negligence of the *Gothland* in the original collision is part of the negligence which caused the second collision, and as, in my opinion, it was contributed to by the default of the master and crew of the *Gothland* not duly reporting to the pilot, its consequences are not covered by the plea of compulsory pilotage. But I am of opinion also that the continuing negligence of the *Gothland* in allowing herself to get across the channel without heeding the *Larenberg* that was coming down it on her port side was also contributed to by the same cause, so that the plea of compulsory pilotage fails altogether with regard to the *Gothland*. On the other hand it is scarcely contested that the negligence of the *Larenberg* is covered by that plea. In both these respects I agree with the judgment of the judge at the trial, and am of opinion that the appeal of the *Larenberg* against the decision of the Court of Appeal to the effect that she was solely to blame should be allowed with costs, and that the plea of compulsory pilotage should be held to be good in the case of the *Larenberg* but should be disallowed in the case of the *Gothland*.

Lord Sumner (read by Lord Shaw of Dunfermline). My Lords, both Courts below have found that the *Gothland*, the overtaking ship, was at such a lateral distance and on such a bearing from the *Alexander Shukoff* when the *Gothland's* pilot himself became aware of the *Alexander Shukoff's* position, that clearly he could then have averted the collision by appropriate action. The reason given by the pilot for not doing so has been found to be false, nor does he allege that the actual position of the *Aberdale* placed him in a difficulty. I am satisfied that, when he saw where the *Alexander Shukoff* was, he must equally have seen where the *Aberdale* was, and I see no reason for assuming some explanation of his conduct

H. L. (E.) 1920 S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND. S.S. LARENBERG v. S.S. GOTHLAND. Lord Sumner.

arising out of the latter vessel's actual position, which he does not even offer for himself. If so, his failure to give way to the *Alexander Shukoff*, when he saw where she was and could have done so, is the sole cause of this collision.

This conclusion makes it unnecessary to come to any decision about the alleged default of the *Gothland's* officers and crew in not assisting the pilot by reporting the *Alexander Shukoff* and her change of course when she gave way to the *Aberdale*. I do not think it is open to your Lordships to consider a case of possible default on the part of the *Gothland's* master in not expostulating with the pilot, after he had seen the *Alexander Shukoff* and still did not keep out of her way. It is a new case not made by questions put to the witnesses. I only desire to say that I do not wish to be understood to favour either class of alleged default, in view of the importance of leaving a pilot to himself as much as possible, where he has only to use his eyes and his wits in order to be more fully informed than any lookout can make him.

As to the *Gothland's* speed, I understand the advice given to your Lordships to be that, under the circumstances, it was not excessive, and in this I concur.

In the case of the *Larenberg*, I agree that the *Larenberg* did not reverse her engines soon enough. If that had been done, when engine action was first considered necessary by her pilot, the accident would not have happened. This, however, was solely her pilot's fault, and she succeeds in the defence of compulsory pilotage.

I think the *Gothland*, equally with the *Larenberg*, contributed by her negligence to bring about the collision. For this purpose it is not necessary to inquire, whether that negligence consisted in the default which brought her into collision with the *Alexander Shukoff*, or in some default in her handling after she had struck the *Alexander Shukoff*, for even in the first case that default continued to operate and to determine her position up to the time of the collision with the *Larenberg*. There may even have been negligence contributing to the collision in both respects.

After she struck the *Alexander Shukoff* the *Gothland*

certainly was under control to some extent and was brought by her pilot over towards the north-east side of the channel, so as to angle across the course of down-coming traffic. As the story he tells is again not true, there is some doubt what he actually did, but it does not appear to me possible to say that the *Gothland* was simply shot across the channel in a helpless condition by reason of the first collision. She was manœuvred into the position, in which she was struck, and did nothing to avoid the down-coming traffic at all, as she ought to have done. In this state of things the *Larenberg* was never reported to her pilot, and, as he was visibly and fully occupied with the position he had got into after the first collision, he ought to have had the benefit of such a report. No doubt he had seen her some minutes before, but I do not think this exonerates the *Gothland's* lookout. No doubt also the *Larenberg* was the overtaking ship, but I think that the position into which the *Gothland* had got by colliding with the *Alexander Shukoff* was so exceptional that those in charge of the watch on the *Gothland* would not be justified in leaving to the *Larenberg* the whole responsibility for keeping out of the way, or in treating her as a ship with which neither they nor their pilot need concern themselves.

I am accordingly of opinion that the *Gothland* has not made out the defence of compulsory pilotage in the case of the *Larenberg*.

OWNERS OF S.S. ALEXANDER SHUKOFF *v.* OWNERS OF S.S. GOTHLAND.

Order of the Court of Appeal reversed and decree of Hill J. restored. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the Admiralty Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals. Nov. 26, 1920.

H. L. (E.) 1920

S.S. ALEXANDER SHUKOFF v. S.S. GOTHLAND.

S.S. LARENBERG v. S.S. GOTHLAND.

OWNERS OF S.S. LARENBERG *v.* OWNERS OF S.S. GOTHLAND.

Order of the Court of Appeal reversed and decree of Hill J. restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the Admiralty Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, Nov. 26, 1920.

Solicitors for the Appellants, Owners of the S.S. *Alexander Shukoff: Thomas Cooper & Co.*

Solicitors for the Appellants, Owners of the S.S. *Larenberg: Stokes & Stokes.*

Solicitors for the Respondents: *Pritchard & Sons.*

[HOUSE OF LORDS.]

H. L. (E.)* 1920 *Nov.* 26.

OWNERS OF S.S. ORDUNA . . . . . APPELLANTS;

AND

SHIPPING CONTROLLER . . . . . RESPONDENT.

ET E CONTRA.

Shipping—Collision—Crossing Courses, Vessels on—"Keep course and speed" Rule—Regulations for Preventing Collisions at Sea, arts. 19 *and* 21.

Two steam vessels were approaching each other on crossing courses at a joint speed of 20 knots, there being a difference of 17 degrees off the opposite courses. The *K.* had the *O.* on her starboard bow and her duty therefore was to keep clear, while the duty of the *O.* was to keep her course and speed. The *K.* took no steps to get out of the way and narrowed on to the port bow of the *O.* until the green light of the *K.* was about ahead at a distance of about a quarter of a mile.

---

* *Present:* VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, LORD MOULTON, LORD SUMNER, and LORD PARMOOR.

The *O.*, under the impression that the *K.* had allowed the time for acting to go by, and that she would keep her course and pass on to the *O.'s* starboard side, starboarded and hard-a-starboarded. About the same time the *K.* ported, and the *O.* struck the *K.* on the port-quarter with her stem :—

Held (by Viscount Finlay, Lord Shaw of Dunfermline, Lord Sumner, and Lord Parmoor; Lord Moulton dissenting), that the two vessels were still "crossing so as to involve the risk of collision" within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea, and that art. 21 was still applicable; that consequently the *O.* was to blame for not keeping her course, it being conceded on the appeal that the *K.* was also to blame for not porting in time.

Decision of the Court of Appeal [1919] P. 381 affirmed.

APPEAL and cross-appeal from a decision of the Court of Appeal (1) varying a decision of Hill J.

The facts are fully stated in the report before the Court of Appeal and in the opinion of Viscount Finlay, and are summarized in the headnote.

Hill J. held that the *Orduna* was alone to blame for the collision.

The Court of Appeal (Bankes and Scrutton L.JJ. and Eve J.) held that both vessels were equally to blame.

The owners of the *Orduna* appealed, and there was a cross-appeal by the Shipping Controller as owner of the *Konakry*, but at the Bar of the House the cross-appeal was not insisted upon.

The House had the assistance of nautical assessors.

1920. July 19, 20, 22. *A. D. Bateson K.C.* and *D. Stephens K.C.* for the appellants. Art. 21 of the Regulations for Preventing Collisions at Sea has no application. There was no risk of collision in the way the ships were crossing. At the critical time they were not crossing vessels, because they were crossed vessels or would have been crossed vessels but for the *Konakry's* porting. The *Orduna* was entitled to assume that the *Konakry* would be careful, and on that assumption there was no risk as soon as the other ship was ahead. The *Konakry* did not see the *Orduna* until she was ahead of her, and the whole fault was hers for

(1) [1919] P. 381.

H. L. (E.) 1920 S.S. ORDUNA v. SHIPPING CONTROLLER.

not keeping any lookout. Assuming that the appellants are wrong in this contention the *Konakry* was standing on until she was very nearly ahead. That brings in the note to art. 21, and the *Orduna* was justified in taking action to avert collision. This was a sudden emergency created by the deliberate action of the *Konakry*, and in the circumstances the wisest thing was to starboard: *The Bywell Castle*. (1) The law on this point is summed up by Sir Gorell Barnes in *The Ranza* (2), which shows that the Court will not be too hard upon an officer if he does not do precisely the right thing at the right moment in the stress of the emergency. See also The Laws of England, Shipping and Navigation (Part XI., Collisions), s. 644.

Butler Aspinall K.C. and *Norman Raeburn K.C.* for the respondent. The appellants' theory that the ships had entered upon a new phase and were no longer crossing vessels breaks down on the facts. *The Norman Monarch* (3) shows that these ships were still crossing ships, and, if that is so, the appellants' case falls to the ground. *The Ranza* is not in point, because upon the evidence the officer of the *Orduna* did not regard himself as in any peril.

A. D. Bateson K.C. replied.

The House took time for consideration.

1920. Nov. 26. VISCOUNT FINLAY. My Lords, this case arises out of a collision which took place between the steamship *Orduna* and the steamship *Konakry*. The collision happened in open sea some 15 or 16 miles to the south of Galley Point on the south coast of Ireland at 9.15 P.M. on December 1, 1918. The *Orduna* is a vessel of 23,000 tons and 569 ft. long; she had passengers as well as crew on board, 270 in all. The *Konakry* was a tanker of 5742 tons burden, and was at the time of the collision in ballast. The *Orduna* was proceeding at 14½ knots on a course N. 66 E. true. The *Konakry* was

(1) (1879) 4 P. D. 219, 223, 226, 228.

(2) (1898) 79 L. J. (P. D. & A.) 21n.

(3) Lloyd's List, Dec. 10, 1918.

proceeding at the rate of 6 knots on a course S. 49 W. true. The *Orduna* was carrying two masthead lights and side lights; the *Konakry* one masthead light and side lights.

The *Orduna* sighted the *Konakry* at a distance of some two or three miles, bearing about a point on the port bow of the *Orduna*. The masthead light of the *Konakry* was first observed, and then, with the aid of glasses, the green light was seen.

The vessels were therefore on crossing courses so as to involve risk of collision, and it was the duty of the *Konakry* to keep out of the way of the *Orduna*, while the *Orduna* was bound to keep her course and speed (arts. 19 and 21), due regard, however, being had to the dangers of navigation and collision and to any special circumstances (art. 27).

Under these circumstances it is obvious that the proper course for the *Konakry* to take was to port. In fact, she kept her course until her green light was ahead of the *Orduna*. She then suddenly ported and the collision took place, the stem of the *Orduna* striking the port side of the *Konakry* about 80 feet from her stern.

What the *Orduna* did is best described in the words of Mr. Crangle, her second officer. In his statement, which will be found at pp. 102 and 103 of the Appendix, he says: "The night was fine, clear but overcast, lights could be seen their full range. Some time after the Commander went into the Chart House, I observed a masthead and green light about one point on the port bow distant between two and three miles. The lights were reported by the crow's nest lookout striking the bell one stroke. I kept my course and speed and continued to watch the lights and saw that they were narrowing on the port bow. When they were about a quarter of a point on the starboard bow and distant about a quarter of a mile off, I ordered the helm to be starboarded 10 degrees and immediately afterwards, as the ships were closing rapidly, I ordered hard-a-starboard, and I myself blew the whistle two short blasts.

"My reason for giving the order to starboard was that it was clear the other ship was passing on to my starboard side

H. L. (E.) 1920 S.S. ORDUNA v. SHIPPING CONTROLLER. Viscount Finlay.

and I starboarded to give her a wider clearance. Almost immediately I blew, the other vessel blew one short blast and opened her red light. At that instant and before I had time to do anything the Commander came out of the Chart House and ordered the helm to be put hard-a-port and rang the starboard engine to 'full speed astern' himself. When this order was given the ships would only be about two ships' lengths apart. I don't remember our whistle being blown one short. There was hailing from the other ship but I could not make out what was said. Shortly afterwards we struck the vessel, which proved to be the *Konakry*, on the port quarter with our stem and port bow, a heavy blow at an angle of about four points."

Hill J., before whom, with the Elder Brethren, the case was tried, found that the *Orduna* was alone to blame. The Court of Appeal found that both vessels were to blame, the *Konakry* for not porting in time and the *Orduna* for starboarding in the manner described by Mr. Crangle in the passage which I have quoted.

In my opinion it is quite clear that the Court of Appeal were right in holding that the *Konakry* was in fault. She ought to have ported sooner instead of holding on until her green light got ahead of the *Orduna*, but even then she would have passed clear if she had not suddenly ported. In fact, this is so obvious that the appeal to your Lordships' House on behalf of the *Konakry* against the finding of the Court of Appeal that she was to blame was very properly not pressed.

The ground on which the *Orduna* has been held in fault both by Hill J. and by the Court of Appeal is that she acted improperly in starboarding. It has been strenuously contended at your Lordships' Bar that the *Orduna* was not to blame. Several grounds were put forward as supporting this contention. One suggestion was that the starboarding took place in the agony of collision and was therefore excusable on the grounds suggested by James L.J. in *The Bywell Castle* (1) in a passage which has been constantly referred to in cases

(1) 4 P. D. 219, 223.

of this description. This suggestion may be at once dismissed. The statement of Mr. Crangle, which I have quoted, shows clearly that it was not under any stress or sense of imminent danger that the *Orduna* starboarded. Those on board the *Orduna* thought that the vessels would pass safely on the courses they were on, but that it was desirable to give a wider berth to the *Konakry*, and starboarded for this purpose.

The contention which was most strongly urged before your Lordships on behalf of the *Orduna* was that in point of fact she did not answer her starboard helm at all, and that therefore the starboarding could not have contributed to the collision. There are concurrent findings in the Courts below that she did answer her starboard helm, and that but for this the collision would not have taken place. I come to the same conclusion.

The duty of the *Orduna* under the regulations was to keep her course and speed, and if she had done so there would have been no collision. We are advised by our assessors, and hold, that there were no considerations of seamanship which absolved the *Orduna* from the duty of keeping her course (art. 27).

Another important contention raised for the *Orduna* was that the crossing rule had ceased to apply at the time when the *Orduna* starboarded, the green light of the *Konakry* being ahead of, or on the starboard bow of, the *Orduna*, so that they were no longer crossing vessels. The green light of the *Konakry* was ahead of the *Orduna*, but even if it had been slightly on the starboard bow arts. 19 and 21 would not have ceased to apply. It appears to me impossible to say that these two vessels had entered on a new phase the moment the green light of the *Konakry* got ahead, or even slightly on the starboard bow of the *Orduna*. The conditions which render the regulations for crossing ships applicable begin as soon as the two ships are approaching one another on courses which, if continued, may cause a collision. These conditions continue to subsist until the vessels have definitely passed out of the phase of crossing ships. It was far too

H. L. (E.) 1920

S.S. ORDUNA v. SHIPPING CONTROLLER.

Viscount Finlay.

soon to conclude that the vessels had passed when the green light of the *Konakry* got ahead of the *Orduna*. The operation of passing was not yet completed, and it would lead to danger and collision in very many cases if such a state of matters should be considered to constitute the position of passed ships so as to absolve either of them from further attention to the regulations for crossing. The case of the *Norman Monarch* (1) was referred to. There is no conflict between the view which we take in the present case and that which was taken in the *Norman Monarch*. In any case it is a question of fact whether the vessels are to be considered as no longer crossing ships.

It was also contended for the *Orduna* that the actions of the *Konakry* were such as to convey the impression that she intended to hold on her course, and that those on board of the *Orduna* were justified in acting on this hypothesis, and in trying to give the *Konakry* a wider berth by starboarding. I am not prepared to adopt this view. It was, I think, too soon for the *Orduna* to conclude that the *Konakry* would keep her course. Nothing had happened to prevent the crossing rule from applying. I am far from saying that cases may not occur in which the action of one ship may mislead the other to such an extent as to prevent the latter from being liable for an infraction of the rule. But in my judgment nothing had occurred in the present case to bring the *Orduna* within this principle. The *Konakry* was in my judgment most grievously to blame, but the *Orduna* was also in fault, and the usual consequences must follow.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree with the judgment which has just been delivered.

LORD MOULTON. My Lords, the collision in this case happened on the evening of December 1st, 1918, off the coast of Ireland between the *Konakry*, a converted tanker of 5742 tons gross and 360 feet long, in ballast, and the

(1) Lloyd's List, Dec. 10, 1918.

steamship *Orduna*, a triple-screw steamship of 15,499 tons gross, 569 feet long over all, with cargo and passengers.

The night was fine and clear; both vessels were carrying regulation lights, the *Konakry*, a single mast head light and side lights and a stern light, and the *Orduna*, two mast head lights, side lights and stern lights. The speeds were, the *Konakry*, about 6 knots, and the *Orduna*, about 14 knots. The courses were crossing courses, there being a difference of 17° off opposite courses; the *Konakry* having the *Orduna* on her starboard side, and the *Orduna* accordingly having the *Konakry* on her port side.

In spite of the fact that the tale told by the *Konakry* is obviously untrue and must be rejected, the circumstances of the collision can be ascertained with somewhat unusual accuracy.

When the vessels first sighted each other the *Orduna* was at a distance of two to three miles from the *Konakry*. The mast head and green lights of the *Konakry* lay on her port bow at an angle varyingly estimated at half a point to a point. The *Konakry* was therefore the give-way ship, and the duty of the *Orduna* was to keep her course and speed. It is, therefore, beyond doubt that the *Konakry* ought thereupon to have ported and thus passed the *Orduna* port to port, going under her stern. Instead of this she kept on her course until she came to a position due ahead of the *Orduna*—which had been duly keeping her course and speed—or, as I should infer from the evidence, a little on her starboard bow. At that time the distance between the vessels was about a quarter of a mile.

When in this position the officer of the *Orduna*, considering that it was clear that the *Konakry* was crossing on her starboard side, ordered her helm to be put to starboard about 10° and immediately afterwards put her helm hard-a-starboard and blew two blasts. Just at that moment the *Konakry* showed her red light, indicating that she was porting, and sounded one short blast. Thereupon the *Orduna* immediately put her helm hard-a-port and put her starboard engine astern, so as to get her back to her original course.

H. L. (E.) 1920 S.S. ORDUNA v. SHIPPING CONTROLLER. Lord Moulton.

The period of time during which her helm was a-starboard was so short that it could have altered her course only very slightly, and I have no doubt that she had recovered her course when the *Konakry*, which had continued hard-a-port, was struck by her at a point about 80 feet from the stern on her port side and injured so seriously that she had to be abandoned and subsequently sank.

The learned judge at the trial thought that in spite of the immediate hard-a-porting by the *Orduna*, after she had commenced to starboard, and the reversal of her starboard engine, the combined effect of her manœuvres had to some extent moved her to the left of the line which she had been previously pursuing, even if she had recovered her former course, and that, seeing that a displacement of something like 80 feet would have cleared the two vessels, this combined effect contributed to the collision. It may be that this is so, although considering that we have to set against it the loss of way of the *Orduna* due to her helm action and her subsequent hard-a-porting and reversing her starboard engine, I think it doubtful. But whether the collision would have occurred if the *Orduna* had kept her course and speed as it is suggested that she ought to have done, it would undoubtedly have been a very close shave, and both vessels would have been in a position of great danger, and as the question whether the action of the *Orduna* was improper is the only question before us (since the counsel for the *Konakry* very wisely refrained from arguing that she was not to blame), and does not, in my opinion, turn on slight things such as these, I need not pause to discuss them. If I am right in my view of the case, it depends solely on the interpretation of the regulations which govern the case and on the obligations imposed on the respective vessels thereby.

The two regulations applicable to the case are as follows:

"(1.) Art. 19.—Two steam vessels crossing.—When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

"(2.) Art. 21.—Vessel to keep her course.—Where by any

of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

When the *Konakry* first observed the *Orduna* she was indisputably the give-way vessel under art. 19. She was at such a distance and the courses were so fine (being only 17° short of opposite courses) that she was crossing so as to involve risk of collision. The *Orduna*, therefore, was right in keeping her course and speed as she in fact did. But the *Konakry* instead of porting at that time, as she should have done, continued on her course in a direction taking her across the course of the *Orduna*, until she came directly ahead of that vessel. She could not be oblivious of the fact that she was actually crossing the course of the *Orduna*, because she could see the two mast head lights of the *Orduna* which must, at that time, have been in a straight line, and that fact was equally obvious to those on board the *Orduna*. She had, therefore, by her conduct—blameworthy though it was—altered the position of things and had thereby altered the application of the Regulations which are in question. She was still a crossing ship, but she was no longer crossing, "so as to involve risk of collision." On the contrary, she was dead ahead of the *Orduna* at a distance of a quarter of a mile and proceeding at an angle of 17° to her course. Indeed, if we take it that she was a quarter of a point on the starboard bow of the *Orduna*, as the fourth officer of the *Orduna* states in his evidence, she must (considering the fore-shortening of the ship due to the small angle between the courses) have already crossed and must have been physically on the starboard side of the line of the course of the *Orduna*. But, in any case, she must have been in the act of crossing and in no risk of collision. She had only to continue her course in order to put both ships in absolute safety, for she would have passed to the starboard side of the *Orduna*, and the two ships would have thus passed starboard to starboard.

In my opinion, therefore, the fundamental condition of the application of art. 21—namely, that it applies only to ships crossing so as to involve danger of collision—had ceased

H. L. (E.) 1920

S.S. ORDUNA v. SHIPPING CONTROLLER.

Lord Moulton.

to exist. If the *Konakry* had continued her course she would have crossed without danger of a collision. If she had gone on, there would have been no danger whatever, and I hold that not only was she bound to do so, but that the *Orduna* was entitled to assume that she would do so and that the *Orduna* was freed from her obligation to keep her course and speed, and that her starboarding under those circumstances was an act of prudence rather than of negligence.

It must be borne in mind that if the *Orduna* is to be held to have been subject to the rule as to ships crossing when there is danger of collision we must hold that she was under the obligation to maintain her speed as well as her course unchanged. It seems to me impossible to do this. The two ships had at the moment of the manœuvre of the *Konakry* a velocity of approach of 20 knots per hour, and their distance was about a quarter of a mile and (by reason of the manœuvre of the *Konakry*) they were directly approaching each other. For the *Orduna* to maintain her speed as well as her course in such circumstances would, in my opinion, have been madness.

It might be contended that she should have maintained her course but not her speed, but this is tantamount to an admission that she was freed from the operation of the rule under which we are asked to find her to blame.

I am therefore of opinion that this appeal should be allowed, and that the *Konakry* should be held to be solely to blame.

LORD SUMNER (read by LORD SHAW OF DUNFERMLINE). My Lords, Hill J. found that the *Orduna* starboarded to a green light on her port bow withal or at most dead ahead. There was evidence sufficient to justify this finding.

Accordingly, the stand-on ship altered course to a ship crossing her so as to involve risk of collision. It is not possible to say that this breach of the rule was not also a contributory cause of the collision. Further, the evidence of the officer of the watch, that at the moment when he took this helm action he judged the position to be a safe one, leaves him

without excuse. He was not embarrassed by the *Konakry*, but was mistaken in his own navigation. The *Orduna* is to blame.

The cross-appeal of the *Konakry* against the decision of the Court of Appeal, that her failure to keep out of the *Orduna's* way was also a contributory cause of the collision, has been abandoned.

In the result, therefore, the decision of the Court of Appeal ought to be affirmed and the *Orduna's* appeal dismissed.

LORD PARMOOR (read by LORD SHAW OF DUNFERMLINE). My Lords, during the night of December 1, 1918, a collision occurred, off the south coast of Ireland, between the steamships *Orduna* and *Konakry*. Hill J. pronounced the *Orduna* alone to blame, but the Court of Appeal pronounced both vessels to blame in an equal degree. Both parties have appealed to this House, the appellants asking that the *Konakry* may be declared alone to blame, and the respondents asking that the decree of Hill J. may be restored, and the *Orduna* declared alone to blame. The only question, however, argued in the appeal before your Lordships, was whether blame attached to those in charge of the *Orduna*. The first matter to be determined in the appeal is, whether, at the critical time, the vessels were in the relation of vessels crossing, so as to involve risk of collision. If they were crossing vessels with risk of collision, it was the duty of the *Konakry* under art. 19 of the Regulations for Preventing Collisions at Sea to keep out of the way; and the duty of the *Orduna* to keep her course under art. 21, subject to the limitations to be found in that article, and in arts. 27 and 29. Those in charge of the *Konakry* have been found to be negligent in not porting in sufficient time, and the liability of the owners was not contested in the argument before your Lordships. The case for the *Orduna* is that she kept her course and speed until the *Konakry*, showing her green light, and shaping to cross ahead, had drawn very close, and was about ahead, and on the starboard bow withal, when the helm of the *Orduna* was ordered first starboard, and then hard-a-starboard. It

H. L. (E.) 1920

S.S. ORDUNA v. SHIPPING CONTROLLER.

Lord Parmoor.

becomes necessary, therefore, to determine whether at the time, when the order was given, those in charge of the *Orduna* were subject to the regulations contained in art. 21. At the time of the collision the *Orduna* was in charge of the junior second officer. He was not called at the trial, but his deposition was put in before the Court. The following is his account of the action of the *Konakry* up to the time when the *Orduna* starboarded.

"Deponent observed a green light and masthead light about a point on the port bow at a considerable distance. . . . . Deponent maintained his course and speed, but the other vessel's green light remained open and the bearing became finer on the port bow. When the green light was almost right ahead and still at a safe distance, Deponent sent the extra Fourth Officer to the Wheelhouse to order the helm 10° to starboard and when the extra Fourth Officer returned, the green light was about one-quarter point on the starboard bow and getting so close that Deponent feared a collision. Deponent immediately ordered the helm hard-a-starboard, first giving two short blasts of the whistle, and immediately afterwards the other vessel blew one short blast and opened the red light. . . . ."

Hill J. found that, when the helm of the *Orduna* was starboarded, the green light of the *Konakry* was not on the starboard of the *Orduna*, and was not more than ahead, if as much as ahead, of which he is doubtful. On this point the Court of Appeal arrived at the same conclusion, and there is, in my opinion, ample evidence to support these concurrent findings on a question of fact.

If this conclusion is accepted the *Konakry* at the critical time was a crossing vessel, and it appears to me that there was clearly risk of collision, and that the provisions of art. 21 were applicable to the *Orduna*. It is not sufficient to exonerate the *Orduna* that the *Konakry* might have crossed with safety in front of the *Orduna*, if those in charge had not ported her helm. At that time the two vessels were less than half a mile apart, and approaching one another nearly end on, at a rate of not less than 20 knots. Whether the position of

the two vessels in relation to one another was one of risk is largely a question of navigation. That there was a risk of collision was the view of the Elder Brethren of the Trinity House, of the nautical assessors who advised the Court of Appeal and this House. I agree in the concurrent opinions which have been expressed on this point.

If art. 21 applies, there is a heavy burden on those in charge of the *Orduna*, to show that they were justified in not keeping her course and speed. It is obviously of first importance that two vessels approaching one another with a risk of collision should be able to rely on the observance of arts. 19 and 21. In my opinion the considerations applicable fall far short of supporting the case of the *Orduna*. Although the porting of the helm of the *Konakry* was delayed so long as to import negligent navigation, there was still time for the *Konakry* to "give way and avoid a collision" if the *Orduna*, the stand-on vessel, had kept her course in accordance with the regulations. In other words, the collision would have been avoided if the *Orduna* had obeyed the regulations. In addition, the Elder Brethren and the assessors in the Court of Appeal have found that those in charge of the *Orduna* were wanting in care and skill, and proper seamanship, in giving the order to starboard, and then hard-a-starboard, and in not reversing her engines. The assessors in your Lordships' House expressed the same view, and I certainly am not prepared to differ from them on a question of seamanship. Those in charge of the *Orduna* have failed to justify their action in not following the regulations applicable to a stand-on vessel, and further they adopted a manœuvre which, in the view of the Elder Brethren, and of all the nautical assessors, was not consistent with care and skill and proper seamanship.

It is, however, alleged, as a defence, on behalf of those in charge of the *Orduna*, that the *Konakry* allowed the time for acting to go by, and thereby led the *Orduna* to suppose that she could not, and did not, intend to act, and that thereby the *Orduna* was relieved from the reciprocal obligation of maintaining her own course and speed: *The Olympic and*

H. L. (E.) 1920

S.S. ORDUNA v. SHIPPING CONTROLLER.

Lord Parmoor.

H.M.S. Hawke. (1) A defence of this character would always require critical examination. I can find no ground for its application in the present instance. It was further argued that the manœuvre of the *Orduna* had not effectively altered her course at the time of the collision, and that therefore it was not a contributory cause of the collision. This is largely a question of seamanship, and the assessors in the Court of Appeal were asked: "Would the starboarding of the helm of the *Orduna*, followed by her porting in the way described, alter her course laterally, so as to bring her nearer the line of the *Konakry* advance?"

The answer was in the affirmative, an answer in which the nautical assessors advising your Lordships concurred.

My Lords, I think that the appeal of the *Orduna* should be dismissed.

Order of the Court of Appeal affirmed, and Appeal and Cross-Appeal dismissed with costs.

Lords' Journals, Nov. 26, 1920.

Solicitors for the appellants: *Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitor for the respondent: *Treasury Solicitor.*

(1) [1913] P. 214, 279.

[PRIVY COUNCIL.]

CITY OF QUEBEC . . . . . APPELLANTS ;

AND

BASTIEN . . . . . RESPONDENT.

J. C.*
1920
July 15.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—City of Quebec—Water Supply—Statutory Powers—Riparian Owner—City of Quebec Incorporation Act (29 *Vict. c.* 57, *Can.*), *s.* 36, *sub-ss.* 1, 3—*Civil Code of Quebec, art.* 503.

Upon the true construction of s. 36, sub-ss. 1, 3, of 29 Vict. c. 57 (Can.), as amended by 59 Vict. c. 47, s. 12, granting powers to the city of Quebec to take water from the river St. Charles, the city is liable to pay damages to a lower riparian owner if by an exercise of the power injury is done to his riparian rights under art. 503 of the Civil Code, unless there has been a surrender of those rights by reason of the city having purchased a servitude from the owner. Damage to riparian rights is a damage to land within the meaning of s. 26, sub-s. 1, above mentioned.

Judgment of the Court of King's Bench affirmed.

APPEAL by special leave from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (June 27, 1916), affirming the judgment of the Superior Court (November 27, 1915).

The respondent owned a mill, used in connection with a tannery, situated upon the St. Charles river below the intake for the supply of water to the appellant city. He sued the city in the Superior Court to recover damages for the loss sustained to him in the working of his mill by reason of the city's abstraction of water from the river. The facts and the relevant statutory provisions appear from the judgment of their Lordships.

The trial judge (Roy J.) gave judgment for the respondent, and that judgment was affirmed by the Court of King's Bench, Appeal Side (Archambeault C.J., Trenholme, Lavergne and Pelletier JJ.; Cross J. dissenting); the appeal is reported at Q. R. 25 K. B. 539.

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and Mr. JUSTICE DUFF.

J. C. 1920 — CITY OF QUEBEC v. BASTIEN.

1920. July 8. *Sir John Simon K.C.*, *Chapleau K.C.* and *T. Mathew* for the appellants.

Lanctôt K.C., *Geoffrion K.C.* and *Larne* for the respondent.

The arguments sufficiently appear from the judgment of their Lordships. Reference was made to *Geddis* v. *Bann Reservoir Proprietors* (1) and *Chasemore* v. *Richards*. (2)

July 15. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The actual field of controversy in the argument at the Bar in this appeal turned out to lie within narrow limits. The only question that really arose proved to be whether the appellants, in exercising a statutory power which undoubtedly entitled them to do what they actually have done, could do it without paying for the damage they have inflicted.

In 1846 the then Parliament of Canada passed an Act for the supply of the city of Quebec with water, and, after various amending Acts had been passed, the relevant provisions on the subject were consolidated in an amending Act of 1865 (29 Vict. c. 57 of the statutes of Canada), entitled "An Act to amend and consolidate the provisions contained in the Acts and Ordinances relating to the incorporation of and the supply of water to the City of Quebec." That Act has been amended by 59 Vict. c. 47 of the Quebec Legislature, among other statutes.

Sect. 36, as amended by s. 12 of the later Act, provides, inter alia, as follows: "(1.) The corporation of the city of Quebec is authorised to make, erect, construct, repair and maintain, in the city of Quebec, and without the limits of the said city for a distance of 50 miles, water-works, together with all appurtenances and accessories necessary to introduce, convey and conduct throughout the said city and parts adjacent a sufficient quantity of good and wholesome water, which the said corporation is authorised by the present Act to take and distribute for the use and supply of the inhabitants of the said city and for the parts thereto adjacent; and also to improve, alter or remove the said water-works or any part

(1) (1878) 3 App. Cas. 430, 438. (2) (1859) 7 H. L. C. 349.

or parts thereof ; and to change the site of the several engines and places or sources of supply thereof ; and also to erect, construct, repair and maintain all the buildings, houses, sheds, engines, water-houses, reservoirs, cisterns, ponds and basins of water and other works necessary and expedient to convey water to the said city, and parts adjacent thereto :— For this purpose the said corporation may purchase, hold and acquire any lands, tenements and immovable estates, servitudes, usufructs and hereditaments in the said city, or within a circuit of fifty miles from the limits of the said city ; and also to make contracts for the acquisition of lands necessary for the said water-works ; acquire a right of way whenever it may be necessary ; pay any damages occasioned by such works either to buildings or lands ; enter into and make agreements and contracts with any person for the construction of the said water-works in whole or in part ; superintend and direct the works completed ; name and appoint an engineer and all officers and labourers necessary, and fix their salaries or wages ; enter during the day-time, upon the lands of private individuals for the purposes aforesaid and also make excavations and take and remove stones, soil, rubbish, trees, roots, sand, gravel and other materials and things, but by paying or offering a reasonable compensation for the said materials and things, and by conforming in all things with the provisions of this section. . . . . (3.) All bodies politic or corporate, or corporate or collegiate corporations, aggregate or sole, communities, husbands, tutors or guardians, curators, grevés de substitution, executors, administrators and other trustees or persons whatsoever, are authorised to sell to the said corporation such lands, tenements, servitudes, usufructs and hereditaments, which the said corporation may require for the purpose of the present section, and which they may be possessed of in their present qualities ; they may also agree with the said corporation in the same way as private individuals, respecting all matters relative to the works mentioned in the tenth and eleventh sub-sections of the present section ; and all contracts, agreements, references to arbitrators, sentences and verdicts

J. C. 1920 CITY OF QUEBEC v. BASTIEN.

rendered for or against them, shall be equally binding upon those whom they represent, wherever the property or interests of such may be concerned."

The interpretation of s. 36, sub-s. 1, appears to their Lordships to be clear. The corporation is empowered to make any waterworks it requires, within the limits specified, and to take as much water as it pleases for the supply of the city. It may purchase any interests in land or any servitude it desires. All this is rendered lawful, but the corporation must, by way of compensation for actual injury done, pay any damages from time to time occasioned by its waterworks to buildings or lands, including damage by abstraction of water. Sub-s. 3 contains a power enabling the corporation to purchase lands, servitudes, usufructs or hereditaments, and, if it chooses to take this course, it may so get rid of present or future liability to pay for by way of damage, which might prove to be of a continuing or recurring character. But it need not take this course, if it prefers to remain under the continuing or recurring liability which sub-s. 1 imposes.

The river St. Charles flows from the north-west down to the city of Quebec. In 1851 the appellants, the corporation, acting under the powers they originally possessed, erected a dam up the river, about eight miles above the city, and there established the intake of their water supply. In the first instance the supply pipe was one of 18 inches diameter. About 1883 this pipe had a 30 inch pipe added to it, to provide for the requirements of the growing city, and, before 1914, a third pipe, of 40 inches diameter, was added.

The respondent has a mill on the river about half a mile below the intake of the appellants, which he uses as a tannery. In August, 1914, he commenced the action out of which this appeal arises, alleging that the appellants' abstraction of water had deprived him of the pressure necessary for working his mill, and claiming damages. All other questions, including that of the quantum of damages, have been finally disposed of in the Courts below, and the question which remains is whether the appellants are under any liability at all for damages for taking the water. Their case is, first, that they have

not been shown to have acted negligently or outside their powers, that the Legislature having authorized them to take the water in the way they have done, they have committed no wrongful act, and, secondly, that in any case no damage has been occasioned to buildings or lands within the meaning of s. 36, sub-s. 1.

In their Lordships' view, if the appellants are wrong on their first point, they are not entitled to succeed on their second point. Art. 503 of the Civil Code of Quebec, which does not materially alter the common law, provides that: "He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs. . . . ." This provision, in their Lordships' view, must be taken, having regard to the character of the common law on the subject in Quebec, to mean that the lower riparian owner has a right and title to the natural flow of the water as an incident of his right of property in his land. This right and title may be surrendered by the constitution of a servitude in favour of an upper riparian owner. But that not having been done, damage occasioned to the enjoyment of this right is, in law, damage to the land within the language of s. 36, sub-s. 1.

The only point open to the appellants is thus their first point, and on this subject their Lordships are of opinion that the contention maintained at the Bar for the appellants fails. It is true that what was done was rendered lawful by s. 36, sub-s. 1. But it was rendered lawful, if the appellants had not, under sub-s. 3, bought up the proprietary rights which might be injured under art. 503 of the Code or otherwise, only under the condition subsequent that the appellants should, notwithstanding that there was no injuria, pay, under a liability imposed by s. 36, sub-s. 1, for the damnum which should from time to time prove to have been occasioned.

This was in substance the view taken of the law by Roy J., the learned judge of the Superior Court of Quebec who tried the action. The majority of the learned judges

J. C. 1920 CITY OF QUEBEC v. BASTIEN.

who heard the case in the Court of King's Bench on appeal have come to the same conclusion as he did. In this conclusion their Lordships concur. They are unable to accept the reasoning of Cross J., who dissented. That learned judge thought the appellants had been given power to supply all the inhabitants of the city of Quebec, and to take all they needed for this purpose. No doubt this is so, but when the learned judge proceeds to suggest that in being given such a power the appellants have been put into a position not differing from that of a landowner, who may take and consume the water for the reasonable needs of his land, their Lordships cannot agree with him. The appellants have been put by the statute into the position of being able lawfully to take the water, and, if necessary, all the water in the river, without any of the restrictions which under the Code and by the common law would restrain the action of an ordinary riparian landowner in doing so, but they have been freed from these restrictions only upon condition that they should pay for damnum occasioned.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs. Having regard to the special terms on which leave to bring the appeal was granted to the appellants, their Lordships think that these costs before this Board should be given in the circumstances as between solicitor and client.

Solicitors for appellants : *Charles Russell & Co.*
Solicitors for respondent : *Stephenson, Harwood & Co.*

[PRIVY COUNCIL.]

THE KING . . . . . APPELLANT;

AND

PAULSON AND OTHERS . . . . . RESPONDENTS.

J. C.*
1920
Aug. 2.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Landlord and Tenant—Lease—Forfeiture—Breach of Covenant—Waiver—Election—Acceptance of Rent—Proviso requiring Waiver to be in Writing.

The principle of law that a lessor who accepts rent knowing that there has been a breach of a covenant in the lease thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver by the lessor shall take effect unless it is in writing.

In 1904 the Crown granted a mining lease of land in Canada, the lessee covenanting to commence mining operations in one year, and to work a mine within two years and thereafter continuously, unless excused by the Minister; the lease also provided (1.) that no waiver of any breach should take effect unless it was expressed in writing, and (2.) that if the lessee failed to perform any covenant therein contained which had not been waived the Minister might cancel the lease, and that thereupon it should become null and void, and the Crown might re-enter upon the land. The lessee did not commence mining operations, but down to July, 1909, the time was periodically extended and the rent, which was payable annually in advance, accepted; in July, 1909, the lessee paid a year's rent, and it was accepted conditionally pending a decision upon an application by the lessee for a further extension of time. In September, 1909, the Minister wrote to the lessee's solicitors stating that the lease had been cancelled and that the year's rent would be returned :—

Held, that the Crown had elected to treat the lease as subsisting and could not cancel it.

Judgment of the Supreme Court affirmed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (December 29, 1915) reversing a judgment of the Exchequer Court (April 14, 1915).

The action was brought in the Exchequer Court of Canada by the Crown on the information of the Attorney-General for Canada against the respondent Paulson for a declaration that a mining lease granted by the Crown to the respondent and

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD DUNEDIN, and LORD ATKINSON.

J. C. 1920 REX v. PAULSON.

dated August 8, 1904, was cancelled, forfeited and void. In the alternative it was prayed, if it should be held that the lease to Paulson was not forfeited, that it be declared that the subsequent lease to the respondents, the International Coal and Coke Co., Ld., was issued in error and that it be cancelled. The facts appear from the judgment of their Lordships.

The trial judge (Cassels J.) held that the lease to Paulson had been properly cancelled by the Crown. Upon appeal to the Supreme Court of Canada that Court by a majority of three (Sir Charles Fitzpatrick C.J., Duff and Anglin JJ.) to two (Idington and Brodeur JJ.) allowed the appeal and dismissed the information. The majority of the Court held that it was essential under the terms of the lease that a cancellation should be effected by a notice in writing which actually reached the lessee, and that no such notice had been received by the respondent. The appeal is reported at 52 Can. S. C. R. 317.

1920. July 2, 5. *Macmaster K.C.* and *T. Mathew* for the appellant. Having regard to clause 6 of the Order in Council of June 11, 1902, the lease became void ipso facto upon the respondent Paulson failing to commence operations in one year or failing to work a mine in two years. So far as the lease purported to enable the Minister to extend the time it was ultra vires. If that is not so, there was in 1909 and 1910 a failure to perform the covenant in the extended time and an effectual cancellation by the letters and the subsequent grant of a lease to the respondents the International Coal and Coke Co., Ld. The lease provides that no waiver shall be effected unless it is in writing ; there was no waiver in writing. But in any case Paulson was in default and the Crown could retain the sum paid as rent in July, 1909, pending its decision whether a further extension should be granted. Paulson could have objected to that course ; not having done so he must be taken to have assented to the money being held otherwise than as rent.

Hon. Sir M. Macnaghten K.C. and *G. Lawrence* for the respondents the International Coal and Coke Co., Ld.,

contended that the lease was not ultra vires, but in other respects supported the contention on behalf of the Crown.

Smellie K.C. for the respondent Paulson. The terms of the lease were not ultra vires, and under clause 17 the lease was voidable at the option of the Crown and not void : *Quesnel Forks Gold Mining Co.* v. *Ward.* (1) Upon the true construction of clause 12 of the lease the Minister had power to extend the time for commencing operations as well as for starting a working mine. There was an extension of time and receipt of rent, amounting to a waiver in writing, down to July, 1909. What took place in 1909 and 1910 was a waiver by the Crown of any breach subsequent to July, 1909 ; it was an election to treat the lease as subsisting. The cheque was sent as rent and the Crown could not retain the money without incurring the consequences of an acceptance of rent with knowledge of a breach of covenant : *Croft* v. *Lumley.* (2) There was no evidence that the rent had ever been returned.

Macmaster K.C. replied.

Aug. 2. The judgment of their Lordships was delivered by

Lord Atkinson. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated December 29, 1915, which reversed a judgment dated April 15, 1914, of the Exchequer Court of Canada, by which latter judgment it had been declared that a lease, dated August 8, 1904, granted by the Crown to the first-named respondent, had been forfeited or cancelled and set aside. In the information filed by the Crown, out of which this appeal has arisen, it was prayed not only that this lease of August 8, 1904, should be declared as above, but that in the alternative it might be adjudged, in the event of the latter being found not to have been forfeited, that a subsequent lease dated June 28, 1910, made by the Crown to the second respondent had been made inadvertently and should be cancelled, and that it should be adjudged that the International Coal and Coke Co., Ld., should be ordered to indemnify the appellant for all expenses, loss, or damage resulting from the refusal of the plaintiff to

(1) [1920] A. C. 222. (2) (1858) 6 H. L. C. 672, 697, 705.

J. C. 1920 REX v. PAULSON.

revive the lease which had been granted to the respondent Paulson. By the decree of the Supreme Court of Canada it was ordered and adjudged that the appeal should be allowed, the judgment of the Court of Exchequer reversed, and the information of His Majesty dismissed, and that His Majesty should pay to the appellant Paulson his costs in the Court of Exchequer and in the Supreme Court. No order was made on the prayer for alternative relief.

Sect. 23 of the Dominion Lands Act (R. S. Can., 1886, c. 54) provides as follows: "Sections eleven and twenty-nine in every surveyed township throughout the extent of the Dominion lands are hereby set apart as an endowment for purposes of education, and shall be designated school lands: and they are hereby withdrawn from the operation of the clauses of this Act which relate to the sale of Dominion lands and to homesteads therein: and no right to purchase or to obtain homestead entry shall be recognised in connection with the said sections, or any part of them." By s. 24 it is directed that school lands shall be administered by the Minister of the Interior under the direction of the Governor in Council. Sect. 47 of the same statute runs thus: "Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council, by regulations made in that behalf."

By Order in Council of June 11, 1902, in virtue of the provisions of s. 47 of the Dominion Lands Act, the issue of leases of school lands in Manitoba and the North-west Territories for coal-mining purposes was authorized for the development of coal mines underlying such school lands, subject to terms and conditions of which the first and sixth are alone material on the hearing of this appeal, and are as follows: "(1.) Leases of school lands for coal-mining purposes shall be for a period not exceeding ten years and shall only be granted to applicants, in the order of their applications, who have satisfied the Minister of the Interior of their means and ability

to work efficiently the mines applied for. (6) Failure to commence active operations within one year and to work the mine within two years after the commencement of the term of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown." The term of ten years mentioned in the first condition was afterwards extended to twenty years.

In their Lordships' view these are dominating provisions. Any clauses introduced into leases of mines or mining rights purporting to have been granted under the authority of the Order in Council inconsistent with them, or encroaching upon them, would be unauthorized and might be ultra vires. It would be wholly otherwise if the clauses of such leases merely prescribed the mode in which and the methods by which the general power or authority given by the Order in Council should be exercised in the cases of particular leases. There would not be in such cases any inconsistency or conflict in the contents of the two documents.

The lease impeached is dated August 8, 1904. It is expressed to be made between His Majesty King Edward VII., represented by the Minister of the Interior of Canada, styled therein (where the context permitted) the Minister, and including the successors in office of such Minister, of the first part, and Paul A. Paulson therein called the lessee of the second part. It begins with the following recitals: "And whereas by an Order in Council, dated June 11 in the year of Our Lord 1902, as amended by an Order in Council, dated the 26th of the same month, the Minister is authorized to issue leases of school lands for coal mining purposes, and the development of coal mines under such lands, for the term and subject to the restrictions and limitations in and by the said Orders in Council prescribed. And whereas the lessee having applied for a lease under the said Orders in Council for the said lands hereinafter described, the Minister has granted such application upon the terms and conditions herein contained, such terms and conditions being in accordance with the requirements of the said Orders in Council."

J. C. 1920 REX v. PAULSON.

And by the lease: All mines, seams and beds of coal in, on or under the tracts or parcels of land therein described, with full power to search for, work, mine and carry away the said coal, were demised to the lessee for a term of twenty years from the date thereof at the yearly rent of 96 dollars payable half-yearly in advance on January 15 and July 15 in each year, together with the royalties therein mentioned. The lease is expressed to be granted on several conditions. Those numbered 12, 14, 16 and 17 are alone material in the present appeal. They run as follows: "12. That the lessee shall commence active operations upon the said lands within one year from the date of commencement of the said term and shall work a mine or mines thereon within two years from that date and shall thereafter continuously and effectually work any mine or mines opened by him unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister." "14. That no waiver on behalf of His Majesty, His Successors or Assigns, of any such breach shall take effect or be binding upon him or them unless the same be expressed in writing under the authority of the Minister, and any waiver so expressed shall extend only to the particular breach so waived and shall not limit or affect His or their rights with respect to any other or future breach." "16. That any notice, demand, or other communication which His Majesty or the Minister may require or desire to give or serve upon the lessee may be validly given or served by the Secretary or the Assistant Secretary of the Department of the Interior." "17. That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the breach or non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation herein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and thereupon the same and everything therein contained shall become and be absolutely null and void to all intents and purposes whatsoever, and it shall be lawful for His Majesty or His Successors or

Assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, repossess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding."

It was argued, not very strenuously however, that according to the proper construction of the sixth of the conditions prescribed by the Order in Council of June 11, 1902, on the failure of the lessee to commence active operations within one year from the date of the lease, or on his failure to work the mine within two years from that date, or on his failure to pay the ground rent or royalties as provided, the lease became absolutely null and void. If this were so, then a lessee, by doing any one of these things, and taking advantage of his wrong by relying on his own default, could escape from the burdens of his lease. A lessee so relying on his own wrong, could not compel his lessor to enforce against him the forfeiture of the lease; so that when this maxim is applied even to a condition most absolute in form, it reduces the condition in operation to one merely providing that the lease should only be void at the option of the innocent party: *Quesnel Forks Gold Mining Co.* v. *Ward.* (1) Again the words of the condition are, "shall subject the lessee to the forfeiture of the lease and to the resumption of the land," which in their Lordships' view merely means that the lessee shall render himself liable to have his lease forfeited at the option of the Minister. The Minister is thus empowered to determine the lease, but no provision is contained in the Order in Council as to how, or by what method he is to exercise this power. It was contended (rightly, as their Lordships think) that a method is prescribed by clause 17 of the lease. This condition is wider in its scope than clause 6 of the Order in Council, but having regard to the provisions of the first and twelfth of these clauses, it covers the three defaults with which the former is conversant—namely, the failure of the lessee to commence active operations within the first twelve months from the date of the lease, his failure to work the mine

(1) [1920] A. C. 222.

J. C. 1920 REX v. PAULSON.

within two years from the same date, and his failure to pay the ground rent and the royalty reserved.

The parties have used the words "may cancel" the lease. It is not found in the Order in Council, but the intention is plainly this, that the lease, if any of the defaults mentioned in it have occurred, was to be voidable at the option of the Minister; and could be put an end to by the service on the lessee of a notice in writing, and this notice in writing so served thereby becomes the effective instrument for the purpose desired. Cancellation has no retrospective operation. It does not make a lease void ab initio: *Nelthorpe* v. *Dorrington* (1); *Bolton* v. *Bishop of Carlisle* (2); *In re Way's Trusts*. (3) Nothing material, therefore, turns upon the use of this word.

In fact the lessee, Mr. P. A. Paulson, never commenced active mining operations on the lands demised within the meaning of the Order in Council and of the lease, and never worked the mines, but went into possession of the lands as far as was practicable, and paid the rent reserved in advance as it accrued due up to and inclusive of July 15, 1910, practically for six years. On July 14, 1909, Mr. P. G. Keyes, the Secretary to the Department of the Interior, wrote to Messrs. Lewis & Smellie, the solicitors of the lessee, acknowledging the receipt of the cheque for the rent for the year ending July 15, 1910, and informing them that the amount was only accepted conditionally pending a decision on the lessee's application for an extension of time to begin to work the mine. That letter was apparently inadvertently addressed to Winnipeg instead of Ottawa for, on July 28, 1909, Messrs. Lewis & Smellie received from this same Mr. Keyes a letter which ran as follows: "Gentlemen, I enclose herewith a letter dated the 14th instant which was inadvertently addressed to Winnipeg instead of Ottawa, enclosing receipt in favour of P. A. Paulson for 96 dollars." That cheque must have been cashed by the Department, for in a letter dated September 13, 1909, addressed to Messrs. Lewis & Smellie and signed

(1) (1675) 2 Lev. 113. (2) (1793) 2 H. Bl. 259.
(3) (1864) 2 D. J. & S. 365.

L. Pereira, Assistant Secretary, the writer informed them that Mr. Paulson's application for an extension of time had been refused, that his lease "has been cancelled," and that a refund cheque would be forwarded to the addressees within the course of a day or two in favour of Mr. Paulson for 96 dollars "paid as rental for the current year ending July 15, 1910, which, as you were advised by letter of July 14, was only accepted conditionally." By a refund cheque is obviously meant a cheque drawn by or on behalf of the Minister in favour of Mr. Paulson or of Messrs. Lewis & Smellie. It is denied on behalf of the first respondent that such a cheque was ever received by him or his solicitors. It was for the appellant to prove that it had been sent. No evidence whatever was given to that effect.

No tender has ever been made to the lessee or his solicitors of this sum of 96 dollars so paid and received. The information filed upon January 15, 1913, eighteen months after it had been received does not contain any offer to refund it, or any excuse for its detention. In their Lordships' view it must now be treated as having been, in July, 1909, accepted unconditionally, though that, as will presently appear, is a matter of no consequence.

Before considering what is the effect of that receipt having regard to clause 14 of the lease providing that no waiver on behalf of the lessor shall have effect or be binding upon him unless expressed in writing, it will be desirable to consider the mode of dealing adopted by the parties with reference to their respective rights and obligations under this lease. It is not pretended and is not the fact that the lessee was from first to last guilty of any breach of any covenants or any condition contained in the lease other than his failure, as required by clause 12, to commence active mining operations on the land within one year from the commencement of his term, and to work a mine or mines on the lands within two years from that date. He has entirely failed to do either of these things and his failure is the sole foundation for the present suit. But the obligation imposed upon him by this clause 12 is qualified by this, that he is not bound to fulfil either obligation

J. C. 1920 REX v. PAULSON.

if he be prevented from doing so by circumstances beyond his control, or be excused from doing so by the Minister. Both these events are alleged to have happened. He has, he contends, during all the time up to the cancellation, been prevented from commencing active operations on the lands, or working a mine upon them by circumstances beyond his control, and in consideration of that fact, apparently, the Minister has frequently extended his time for commencing active operations or opening a mine on the lands. These extensions were invariably given by letters written by Mr. Keyes, the Secretary of the Department. The last was given by a letter dated November 25, 1907, addressed to the lessee's solicitors, which ran thus: "With reference to your letter of the 15th ultimo in regard to the application of Mr. Paul A. Paulson for an extension of time within which to begin operations under his lease for coal mining purposes of the East half of section 29, township 7, range 4 west of the 5th meridian, I beg to say that in view of the representations made in your letter, Mr. Paulson will be granted an extension of time until February 1, 1909, for this purpose."

In their Lordships' view this letter amounts in effect, though possibly not in form, to a waiver in writing of all antecedent breaches of his covenant of the kind mentioned, of which the writer was aware at the time it was written.

On June 24, 1908, the lessee's solicitors sent to Mr. Keyes a cheque for 96 dollars in payment of the rent for the year ending July 15, 1909, and received on June 30, 1908, a receipt for the same in a letter from Mr. Keyes running thus: "I enclose, herewith, a receipt in favour of Mr. Paul A. Paulson for 96 dollars in payment of the rental for the year ending July 15, 1909, for coal mining purposes of the east half of section 29, township 7, range 4 west of the 5th meridian, coal berth No. 3 school lands."

The excuse given by the lessee for his inaction is repeated in several letters from time to time. It is shortly this. His land is described as east half, section 29. The adjoining section abutting upon it and belonging to his co-respondent, is section 28. There is no outcrop of coal on section 29; there

is on section 28. The seam of coal under section 29 is several hundred feet below the surface. The coal is being mined in section 28 to the north of section 29, and the tunnels made in the former section were being steadily pushed south towards the latter section so as ultimately to tap its underlying seam. As soon as these tunnels, about 2½ miles in length, had effected a junction with the coal under section 29 the latter could be won and carried away. To mine it till then was impracticable.

On March 11, 1909, when the respondents' solicitors applied for a further extension of time, from February 1 to July, 1910, which was not granted, they stated in their application that unless some unforeseen accident should occur, these tunnels would reach the east half of section 29 before July 15, 1910. Something occurred, however, in the month of November, 1908, which may have destroyed all hope of further extension. The International Coal and Coke Co. apparently coveted east half, section 29. They knew, of course, that their tunnels were being driven up towards its boundary, and on November 27, 1908, they asked the Dominion Land Agent for a lease of it. By letter of December 14, 1908, Mr. Keyes, the Secretary, replied on behalf of the Department to the effect that the application could not be entertained, as this half section was already under lease to Mr. Paulson for coal mining. This application, though refused for the time, appears to have a good deal to say to what subsequently happened in this case. On March 9, 1909, the Company returned to the assault, making a case against Paulson being allowed to hold his lease longer. In reply, a letter was written from the Department apparently by the Minister, informing the agent of the Company, Mr. Whiteside, that, as the Company had already applied for a lease of the coal mining rights on the land No. 29, in the event of the present lease being cancelled, the application made by the Company would be given immediate consideration. Again, on August 24, 1909, the Company wrote to the Minister of the Interior referring to section 29, and stating that their gangways were getting very close to this section, and that he would confer a great favour upon the manager of the Company if he would find out as soon as possible what could

J. C.
1920
REX
v.
PAULSON.

be done with regard to this matter. From a report from Mr. Checkley to the Minister, dated September 1, 1909, which was received in evidence, it is stated that the Coal and Coke Company had asked for the cancellation of Paulson's lease, as he had done nothing on the land, and that the east half of section 29 was absolutely essential for the proper development of the Company's property, and asked for instructions whether the extension of time till July 15, 1910, asked for by Mr. Paulson, was to be granted or whether his lease should be cancelled and one granted to the International Company. The Minister lost no time in making his selection between these alternatives. In the fourth paragraph of the information it is stated that on that very day he made up his mind that Paulson's lease should be cancelled, and that he had by memorandum given directions to that effect pursuant to which the letter of September 13, 1909, was written.

Their Lordships, happily, have not to decide whether the cancellation of Paulson's lease is really due to the latter's omission to commence active mining operations or to work the mines on the land demised by his lease between November 25, 1907, and September 13, 1909, or is due to the sinister importunities of the International Coal and Coke Company; but one thing is clear, that it is rather difficult to reconcile the statements contained in the letter of date of September 13, 1909, with these revelations touching the too successful efforts of the Company, in their own interest, to oust Paulson from the holding for which he had paid the rent and received no benefit for a period of practically six years.

The next matters for consideration are, first, what is the true effect, after a breach of covenant or contract involving a liability to forfeiture has occurred, of the payment of rent by the tenant and the receipt of it by the landlord with full knowledge of the breach; and, second, whether the presence in the lease or contract of tenancy of a provision such as that which exists in the lease in the present case, that waiver of a breach shall not be operative unless expressed in writing, destroys or modifies that effect, and if the latter, to what extent. The authorities appear to their Lordships to establish

that the landlord, by the receipt of rent under such circumstances, shows a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge. They further think the presence in a lease or contract of a provision requiring a waiver to be expressed in writing, such as exists in the present case, does not render inapplicable the principle established, and does not enable the landlord at the same time to blow hot and cold, to approbate and reprobate the same transaction, to say to his tenant, " You were my tenant under a lease or contract of tenancy all the time during which the rent which you have paid me and which I hold, has been accruing," and at the same time to say to him, " You were only my tenant for half that time, and were a mere trespasser during the other half, for I evicted you or cancelled your lease in the middle of the time for which you paid me. I had no right to more than half the rent you paid, but I'll keep the whole of it." It would be wrong and unjust on the part of the landlord so to treat the tenant ; to hold in fact the price of what the latter paid for, the enjoyment of his holding for the entire time during which the rent actually paid was accruing, and yet to deprive him of half of that very property.

In delivering his opinion in *Croft* v. *Lumley* (1) Baron Bramwell, as he then was, when referring to waiver, said : " Now this question supposes there was a breach of covenant giving a right of re-entry ; and it supposes, therefore, that if the lessor elected not to treat the lease as void, rent was due to him. . . . . Now, I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect not to treat the breach as a forfeiture ; for instance, he could not distrain for rent due at Christmas, and at the same time effectually say, that he did not elect to treat an antecedent breach of covenant as a forfeiture ; his act would be taken to be rightful, and bind him, rather than his words make his act wrong." In *Clough* v. *London and North Western Ry. Co.* (2) Mellor J., delivering the judgment of a Court composed of

(1) 6 H. L. C. 672, 706. (2) (1871) L. R. 7 Ex. 26, 34.

J. C. 1920 REX v. PAULSON.

Byles, Blackburn, Mellor, and Lush JJ., after quoting from Com. Dig. Election, C. 2, "If a man once determines his election shall be determined for ever," said: "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture," and he cited *Jones* v. *Carter*. (1) The point is that he cannot do both at the same time. He cannot by receiving twelve months' rent determine that the lease was a subsisting lease while that rent was accruing, and in the middle of that period determine that it no longer subsists.

In *Birch* v. *Wright* (2) the defendant was before the year 1777 tenant from year to year to a Mr. Bowes of the lands in suit at the yearly rent of 223*l.* 10*s.*, payable half-yearly on May 12 and November 22 in each year. On November 22, 1785, the defendant paid all the rent then due except 84*l.* 15*s.*, which remained unpaid. The plaintiff and another had become entitled to the reversion in May, 1785, they brought an ejectment and laid the demise on April 6, 1785. In Trinity term, 1785, they obtained judgment, and in September, 1785, served notice on the defendant requiring him to attorn to them and pay them the money in his hands. He refused, a writ of possession was thereupon executed and he left the lands. An action was then brought for use and occupation, a verdict was found for the plaintiff subject to the opinion of the Court on a case stated. The question for the opinion of the Court was whether the plaintiff was entitled to recover any and what sum in the action. Ashhurst J., in giving judgment, said (3): "From April 6, 1785, to the time of recovering in the action of ejectment, in my opinion the plaintiff is

(1) (1846) 15 M. & W. 718. (2) (1786) 1 T. R. 378.
(3) Ibid. 379.

precluded from recovering in this form of action; for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period." Buller J. said (1): "The action for use and occupation is founded on contract; and unless there were a contract express or implied, the action could not be maintained. . . . . In the present case the plaintiff . . . . has brought his ejectment and obtained judgment on it, which is insisting on the tort; and he cannot be permitted to blow both hot and cold at the same time. The action for use and occupation, and the ejectment, when applied to the same time, are totally inconsistent; for in the one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other he says he is no longer his tenant, and therefore he must deliver up the possession." So in the present case the appellant says to Paulson "I received and kept your rent accruing up to July 15, 1910, because you were my tenant for the whole of that period and owed it to me," and at the same time says, "you were only my tenant for half that period, from that time you were a trespasser because I cancelled your lease and you did not owe me the rent you paid, but which I will hold."

In *Jones* v. *Carter* (2) it was decided that service by a lessor upon a lessee of a declaration in ejectment for the demised premises for a forfeiture operates as an election by the lessor to determine the term, and he cannot afterwards (although there has not been any judgment in ejectment) sue for rent due or after the service of the declaration. In *Grimwood* v. *Moss* (3) Willes J. expressed his full approval of the principle upon which *Jones* v. *Carter* (2) was founded—namely, that the bringing of the action of ejectment was equivalent to the ancient entry. It was an unequivocal act in the sense that it asserts the right of possession on every ground that may turn out to be available to the party claiming to re-enter. *Jones* v. *Carter* (2) was also approved of by Lord Blackburn in *Scarf* v. *Jardine*. (4)

(1) 1 T. R. 387.
(2) 15 M. & W. 718.
(3) (1872) L. R. 7 C. P. 360.
(4) (1882) 7 App. Cas. 345.

J. C.
1920
REX
v.
PAULSON.

The case of *Davenport* v. *The Queen* (1) resembles the present case in many respects. There the Crown under powers conferred by several statutes granted a lease to a lessee who failed to cultivate as he had covenanted to do one-sixth of the land demised within the first year of the term, thus rendering the lessee liable to a forfeiture. Rent was, however, received by the Government with full knowledge of the breach. Notices were published in the Gazette of 1869, 1870 and 1871, to the effect that the rent would only be received conditionally. The rent was payable in advance. The first payment was to be made on September 22, 1867, and all subsequent payments on January 1, from 1869 to 1875 inclusive. Judgment was delivered by Sir Montagu Smith, and it was held that even assuming that a forfeiture had accrued it was waived by the receipt of rent, notwithstanding the notifications that when money is paid and received as rent under a lease a mere protest that it is accepted conditionally and without prejudice to the right to insist on a prior forfeiture cannot countervail the fact of the receipt.

Having regard to all these matters their Lordships are of opinion that it was not competent for the Minister to cancel the lease of the respondent Paulson on September 13, 1909, as he purported to do. It may well be that many cases may occur to which the clause as to waiver would be applicable ; their Lordships think that it is not applicable in the present case under all its circumstances.

Having come to this conclusion it is unnecessary for their Lordships to deal with the point of the sufficiency of the steps taken to effect cancellation of the defendant's lease. The words of clause 17 are : " The Minister may cancel these presents by written notice to the said lessee, and thereupon " everything therein shall become void, etc. Under this clause the notice is the operative instrument. The cancellation is effected by it. Instead of serving a notice running thus " your lease is hereby cancelled," the words are " has been cancelled." The letter is a reply to the appellant's letter of March 11, 1909, and for all that appears on

(1) (1877) 3 App. Cas. 115.

the face of the letter the lease might have been cancelled at any time during the six months between March 11 and September 13.

Again, there is no satisfactory evidence that Messrs. Lewis and Smellie were ever clothed with authority by Mr. Paulson to receive such a notice on his behalf. One has little moral doubt that the receipt of this letter came to the respondent's knowledge, but the service of such documents as this should be fully proved by legal evidence. The inclination of their opinion is that the appellant loses on both these points.

Their Lordships are therefore of opinion that the decision appealed from was right and should be affirmed, and this appeal be dismissed. The appellant will pay Mr. Paulson's costs. There will be no order respecting the costs of the other respondents. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent Paulson: *Blake & Redden.*

Solicitors for respondents the International Coal and Coke Co., Ld.: *Bischoff, Coxe, Bischoff & Thompson.*

[PRIVY COUNCIL.]

J. C.* 1920 Aug. 5.

CITY OF MONTREAL . . . . . APPELLANTS;

AND

COLLÈGE SAINTE MARIE . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Municipal Taxation—Resolution of Municipal Council—Agreement fixing annual Tax—Compromise of Claim to Exemption—Validity.

A Quebec statute establishing a municipality provided that the municipal council might, by resolution, when it deemed expedient in the interests of the town, enter into any agreement determining the amount at which the real estate of a proprietor should be taxed for a specified period. In 1898 the municipal council resolved that the annual amount of taxes imposed upon certain land owned by the respondents should be fixed at 100 dollars for thirty years. It appeared from the evidence that the resolution was passed in pursuance of an agreement compromising a reasonable claim by the respondents that the land was exempt from taxation by statute:—

Held, that the resolution was valid and irrevocable, and that it was binding upon the appellant City with which the town had been incorporated.

Judgment of the Court of King's Bench affirmed.

APPEAL from a judgment of the Court of King's Bench, Appeal Side (November 2, 1915), affirming a judgment of the Superior Court.

The appeal related to the validity and effect of a resolution adopted by the municipal council of the town of Maisonneuve fixing for thirty years the amount of municipal taxes which the respondents should pay in respect of certain land in the municipality. The facts appear from the judgment of their Lordships.

1920. July 19. *Geoffrion K.C.* for the appellants.

Hon. Sir M. Macnaghten K.C. and *St. Jacques K.C.* for the respondents.

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and MR. JUSTICE DUFF.

Aug. 5. The judgment of their Lordships was delivered by DUFF J. The questions in controversy on this appeal concern the legality and effect of a resolution of the municipal council of the town of Maisonneuve of January 26, 1898, by which the council professed to fix the amount payable annually as taxes for thirty years by the respondents, in respect of certain lands within the municipality, at the sum of 100 dollars. The town of Maisonneuve by its action prayed a declaration that the resolution was void, and claimed the sum of 7628 dollars alleged to be due as arrears of taxes upon this property. The respondents having confessed judgment for 2825 dollars, admitted to be due in part under the terms of the resolution of 1898, and in part for arrears of school taxes in respect of which they preferred no claim for exemption, the trial judge, in respect of the residue of the claim, dismissed the plaintiffs' action, and this judgment was unanimously affirmed by the Court of King's Bench. Maisonneuve has since the commencement of the action been incorporated in the city of Montreal, and the last-mentioned corporation appeals.

The property in question was acquired by the respondents in 1872 as a country resort for the pupils and professors of the college, which was situated in the heart of Montreal; and although since that time the locality in which the property is situated has lost its rural character, the property has always been used by the respondents as a place of recreation for its pupils and professors. In 1898, at the time the resolution was passed, the property was in the charge of a person described by the respondents as caretaker, who had a lease of it, at an annual rent of 100 dollars, under which he was entitled to use for himself and his family part of the residence, the greater part of which was reserved for the accommodation of the teachers and pupils, the lessee being obliged to perform for them the duties of housekeeper and cook. The lessee was entitled to, and did, cultivate the land and retain the produce, but a considerable part of it was reserved as a playground for the pupils, who were accustomed to visit it once or twice a week during the college term.

J. C. 1920 — CITY OF MONTREAL v. COLLÈGE SAINTE MARIE.

The respondents having disputed their liability to taxation, on the ground that the property was exempt under the provisions of s. 25 of 61 Vict. c. 57 (the charter of the town of Maisonneuve), an arrangement was arrived at, and the resolution now impeached was the result of that arrangement.

The validity of the resolution is maintained upon the ground that it embodies an agreement between the corporation and the respondents falling within the operation of 61 Vict. c. 57, s. 26, which is in the following words: "The council may, by resolution, when it deems expedient in the interest of the town, enter into any agreement whatsoever with one or more proprietors, either to regulate the manner of valuing his or their real estate, or establish the amount at which the same shall be estimated, or to regulate the mode of taxing real estate, for ordinary or special taxes, or determining the amount at which it shall be taxed for a specified period. . . . . It may also, by resolution, determine the delay and manner of collecting all special taxes. . . . . The same right is granted to the school commissioners and to the trustees of the dissentient schools for the town of Maisonneuve."

On behalf of the appellants it is contended, first, that this resolution is merely a unilateral declaration, and that the evidence fails to disclose the existence of any agreement obliging the respondents to observe the conditions of it; and, second, that the lands in question being manifestly taxable, the resolution must be regarded as an attempt to grant an exemption in the interests of the respondents exclusively, and not as an exercise of the power vested in the council by the statute, which is a power to do certain things only when such things are deemed by the council to be in the interests of the municipality.

Their Lordships are not disposed to differ from the view pressed upon them that an agreement in order to receive effect under the statute must be very clearly made out; such an agreement, if effective, establishes a privilege in respect of taxation, and the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim

to special treatment in such matters must show that the privilege invoked has unquestionably been created.

But their Lordships think that in this case the agreement alleged by the respondents has been proved beyond controversy. Evidence was given in cross-examination by the notary, Ecrement, a witness called by the appellants, who was secretary of the town in 1898, when the resolution was passed, in these words :—

" Le Juge : D. A quelle propos y avait-il des discussions entre les parties, était-ce pour savoir si la corporation défenderesse devait payer des taxes ? R. Oui, monsieur. D. La défenderesse prétendait qu'elle ne devait pas payer ? R. Oui, monsieur. D. Et le conseil prétendait qu'elle devait payer ? R. Oui, monsieur. D. Et il a eu un arrangement qui est la résolution ? R. Oui, monsieur.

" Me. St. Jacques C.R. (procureur de la défenderesse) : D. Cette divergence d'opinion existait depuis plusieurs années ? R. Oui, monsieur. D. Depuis 1898 jusqu'en 1906, la défenderesse a toujours payé, tous les ans, la somme de 100 dollars, conformément à la résolution du mois de janvier 1898 ? R. Oui, monsieur. D. Et en 1906, après la passation de cette résolution rescindant celle de 1898, la défenderesse à continué à offrir, tous les ans, la somme de 100 dollars ? R. Je ne sais pas si c'était tous les ans, mais quelques années.

" Le juge : D. Et vous refusiez ? R. Nous avons toujours refusé. D. La première année elle vous l'a offerte et vous avez refusé ? R. Oui, monsieur."

This evidence, which was not contradicted or questioned, seems to establish that the resolution was intended to embody, and did embody, an agreement between the appellants and the respondents, and that it was accepted and acted upon by both parties as evidencing such an agreement for a period of eight years. In these circumstances there seems to be little ground for dispute that the agreement alleged has been strictly and conclusively established.

It is perhaps unnecessary to add that the respondents' rights under this agreement could not be affected by the

J. C. 1920

CITY OF MONTREAL v. COLLÈGE SAINTE MARIE.

subsequent revocation of the resolution in 1906 without their consent.

Coming to the other contention upon which the appellants rely, their Lordships have no doubt that there were solid reasons which might properly satisfy the council that the claim of the respondents was one which had not a little chance of success in the Courts. The relevant statutory provision (s. 25 of the charter) is in these words: "The following property is not liable to taxation: . . . . (3.) That belonging to fabriques or to religious, charitable, or educational institutions or corporations, or occupied by such fabriques or corporations, and not owned by them solely for the purpose of deriving a revenue therefrom."

The facts bearing upon the nature of the occupation of the property have already been mentioned. One of the learned judges of the Court of King's Bench, Pelletier J., drew from those facts the conclusion that the property was exempt from taxation by force of s. 25, because it was not held "solely for the purpose of deriving a revenue therefrom." Their Lordships do not wish to be understood as disagreeing with this view; but they consider it unnecessary to express any opinion upon the point. The fact, nevertheless, that Pelletier J. has arrived at this conclusion, in itself presents, of course, a formidable objection to maintaining the appeal on the ground that such a view is manifestly untenable; and their Lordships agree with the unanimous opinion of the judges in Quebec that the liability of the respondents to taxation was at least very doubtful, and that there is nothing in the character of the arrangement made or in the evidence adduced to support a suggestion that the council in entering upon it was not really acting in the interests of the municipality, but abusing its powers by exercising them for an ulterior purpose.

The decision of this Board in *Séminaire de Québec* v. *Limoilou Corporation* (1) proceeded upon an entirely different state of facts, the claim for exemption under examination in that case being in respect of property which was in the

(1) [1899] A. C. 288.

exclusive occupation of a tenant and was used by the owners for no other purpose than that of extracting a pecuniary profit from it by way of rent, and that decision has consequently no application here.

The appellants also argue that the Legislature cannot be supposed to have intended when enacting s. 26 of 61 Vict. c. 57, to endow the council with unlimited discretion as to the duration of any privilege granted under that enactment; and the limitation of twenty years to which exemptions granted in respect of "industrial" enterprises under art. 4559 R. S. Q., 1888, are subject, is referred to as something through which it is contended the Courts ought to discover an intention on the part of the Legislature to restrict in like manner the duration of privileges acquired under s. 26. Art. 4559 is strictly limited in its application to the class of cases thereby designated, which does not include privileges arising under s. 26; and in truth their Lordships are invited, by this argument, to amend or supplement these enactments rather than to construe them.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Witham, Roskell, Munster & Weld.*

[PRIVY COUNCIL.]

J. C.* 1920 Aug. 5.

LAMPSON . . . . . APPELLANT;

AND

CITY OF QUEBEC . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Emphyteutic Lease—Agreement for Sale—Construction—Liability of Vendor under Lease.

By a written agreement between the holder of an emphyteutic lease of land in Quebec and a sub-lessee from him, it was agreed that the holder should be obliged to give to the sub-lessee a deed of sale of all his rights under the lease when the sub-lessee had paid to him 200 dollars, and that thereupon the sub-lessee should enter into full proprietorship of the property, subject to the payment of the emphyteutic rent. The sub-lessee paid the 200 dollars and remained in possession after the termination of the emphyteutic lease, but there was no deed of sale. In an action by the lessor against the sub-lessor for possession, rent, and damages for breach of covenant:—

Held, that upon the true construction of the agreement the sub-lessee had merely an option to purchase the emphyteutic lease, and that the sub-lessor remained liable to perform the covenants contained in it.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (March 5, 1918), reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (November 13, 1916), which affirmed a judgment of the Superior Court (February 1, 1916).

The appellant brought an action against the respondents in the Superior Court of Quebec for (1.) arrears of rent under two emphyteutic leases dated March 22, 1888; (2.) damages for failure to deliver up the leased premises on the expiration of the leases; (3.) damages for breach of covenant to repair; and (4.) for possession. The circumstances of the case appear from the judgment of their Lordships.

The trial judge (Lemieux C.J.) gave judgment for the appellant under each of the above heads of claim. Upon

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, and LORD ATKINSON.

appeal to the Court of King's Bench, Appeal Side, for Quebec, that Court (Archambeault C.J. and Trenholme, Lavergne, Cross and Pelletier JJ.) affirmed the decision of the trial judge. Upon a further appeal to the Supreme Court of Canada the judgment of the Appeal Side was reversed by a majority of three (Fitzpatrick C.J., Davies and Idington JJ.) to two (Duff and Anglin JJ.). The proceedings upon the appeal are reported at 56 Can. S. C. R. 288.

1920. July 16, 19. *Macmaster K.C.* and *La Rue* for the appellant.

Chapleau K.C. and *T. Mathew* for the respondents.

August 5. The judgment of their Lordships was delivered by

LORD ATKINSON. The point for decision in this appeal is a very short one, although it has given rise to considerable division of judicial opinion. The facts too are comparatively few and simple. The appellant and his late brother, Georges Lampson, deceased (of whom the appellant is the universal legatee), by two emphyteutic leases, both dated March 22, 1888, demised to one Claude Giguère each of two plots of ground respectively in Champlain Ward in the City of Quebec, each for a term of twenty-five years from April 30, 1888, at a rent in each case of 25 dollars per annum, payable half-yearly on May 1 and November 1 in each year. Each lease contained two covenants by the lessee: first, that he would build a good house with brick or stone chimney within two years from the date of the lease, and keep the same in order and repair during the term of the lease; and, secondly, that he would at the end of the lease give up the rented premises to the lessor in good order and repair together with all improvements.

The true nature of an emphyteutic lease under the Civil Code of Lower Canada is not disputed. It is a contract by which the proprietor of an immovable conveys it for a time to another for a term not less than nine nor more than ninety-nine years, the lessee undertaking (1.) to make improvements, (2.) to pay to the lessor an annual rent, and such other charges

J. C. 1920 LAMPSON v. CITY OF QUEBEC.

as may be agreed upon: Civil Code, art. 567. So long as the term lasts the lessee has all the rights attached to the quality of a proprietor; he may alienate, transfer, or hypothecate the immovable leased, without prejudice, however, to the lessor's rights: Civil Code, arts. 569–570. His interest may be seized as real property under execution against the lessee at suit of his creditors, and sold (art. 571). He holds subject to all the real right and land charges to which the property is subject (art. 576). He is bound to make the improvements he has undertaken to make. He is bound to execute all necessary repairs (art. 577).

Claude Giguère, the lessee, entered into possession, built a house as stipulated, and remained in occupation till July 5, 1893, when by a notarial deed he conveyed and assigned all his interest under these leases in the premises respectively demised by them to one Joseph Côté. During the same year Joseph Côté omitted to pay to the respondents the taxes due to them in respect of the demised premises. The respondents sued him to recover these taxes, with the result that his estate and interest under the leases was taken in execution by the sheriff, who on April 6, 1894, sold it to the respondents, and by deed dated October 10, 1894, conveyed it to them. The respondents became liable to pay to the lessor or his representative the rents reserved by these leases, and to perform all the covenants by the lessee contained in them. The respondents immediately after their purchase took possession of the premises purchased, and some months before the date of the sheriff's conveyance to them, by a notarial deed dated July 31, 1894, leased them for a period of two years, i.e., from August 1, 1894, to August 1, 1896, at an annual rent of 100 dollars, to one Madame Falardeau, wife of David Falardeau.

This sub-lease—for such it may be styled—contained covenants by the sub-lessee, Madame Falardeau, to pay quarterly in advance to the respondents the rent reserved, to pay to the appellant the rent reserved by the emphyteutic lease, to keep the premises in repair during her term, and at the end of the term to deliver them up in good repair and

condition. This lease contained the following clause upon the construction of which the question for decision mainly turns : " Il est convenu entre les parties que la dite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau, un titre de vente de ses droits et prétentions sur les dits baux emphytéotiques lorsque la dite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble sujet toutefois au paiement de la dite rente emphytéotique."

Madame Falardeau immediately on the execution of this lease of July 31, 1894, went into possession of the premises demised to her. She completed the payment of the sum of 200 dollars within the term of the sub-lease. Before the expiration of this term a dispute had arisen between Madame Falardeau and the respondents as to whether a passage was or was not included in the premises demised by the emphyteutic lease. The consequence of this was that the respondents and Falardeau being unable to agree the respondents never executed a deed conveying to her an interest in the premises demised by the emphyteutic lease.

Madame Falardeau continued in occupation of the premises for some ten years from the date of her lease, and then sub-let them to different tenants, who continued in occupation of them up to and after the expiration of the emphyteutic lease on May 1, 1913. In the interval between the expiration of the sub-lease on August 1, 1896, and the expiry of the emphyteutic lease, some rent was paid from time to time by Madame Falardeau to Lampson, but at the time the action was instituted the rent reserved by the emphyteutic lease was largely in arrear, and the premises demised by it were out of repair.

On September 8, 1915, the appellant instituted a suit against the respondents in the Superior Court of Quebec for the recovery of the 150 dollars arrears of the emphyteutic rent, 100 dollars damages in respect of the respondents' failure to deliver up possession at the expiration of that lease, and 745 dollars damages in respect of their breach of covenant

J. C. 1920 LAMPSON v. CITY OF QUEBEC.

to keep the premises in repair and for the recovery of possession of these premises.

On September 8, 1915, the respondents filed a plea to the effect that they had parted with all their rights to the property in question; that Madame Falardeau had become the lessee of the premises by the execution of the deed of July 31, 1894 (the sub-lease); that since that date she had been treated as owner of the property; that as such it was her duty to keep the premises in repair. The appellant, on September 16, 1915, delivered an answer to this plea denying that Madame Falardeau had become the emphyteutic lessee of the property, and on the same day raised on demurrer an issue of law to the effect that the rights of the appellant were unaffected at law by the dealings between the respondents and Madame Falardeau.

The demurrer was argued before the Chief Justice, who decided in the appellant's favour, ordering that the respondents should quit and deliver up possession of the property demised by the emphyteutic lease, should pay to the appellant 150 dollars in respect of the arrears of the emphyteutic rent, and 100 dollars damages in respect of the failure of the respondents to deliver up at the end of the term the demised premises in good repair and condition. On appeal by the respondents from this decision to the Court of King's Bench at Quebec the appeal was dismissed by a Court composed of the Chief Justice (Sir Horace Archambeault) and Trenholme, Lavergne, Cross and Pelletier JJ. From this judgment the respondents appealed to the Supreme Court of Canada, composed of the Chief Justice (Sir Charles Fitzpatrick) and Davies, Idington, Duff and Anglin JJ. Judgment of the Court was, on March 5, 1918, delivered by the Chief Justice (Duff and Anglin JJ. dissenting) allowing the appeal and setting aside the judgment appealed from. From this judgment of the Supreme Court of Canada the present appeal has been brought.

It would appear to their Lordships as if the learned Chief Justice had based his judgment on the assumption that this contested clause beginning with the words "Il est convenu"

simply embodied a bald and precise agreement on the part of Madame Falardeau to pay to the respondents a sum of 200 dollars, and to purchase from them all their estate rights, title and interest in the emphyteutic lease for the unexpired residue of its term, and an agreement on the part of the respondents, equally bald and precise, to sell the same to her; that she went into and retained possession of the demised premises under and by virtue of that agreement of purchase and sale; that her possession of these premises was solely attributable to it; and that when she paid the respondents 200 dollars, as she in fact did, the property purchased passed to and became vested in her under the several provisions of the Code to which he referred without any deed conveying or assigning it ever having been executed. He said: "I construe that clause, read with all that precedes, to mean that, when the sum of 200 dollars has been paid, Mrs. Falardeau becomes the owner of the unexpired term of Giguère's lease acquired by the City under the Sheriff's title and, in addition, the City binds itself to give a deed conveying to Mrs. Falardeau all its rights and pretensions to the unexpired portion of the lease."

In their Lordships' view it is not necessary for them to decide whether the learned Chief Justice was right in the opinion he apparently formed as to the operation and effect of the various articles of the Code to which he referred in a case in which the facts were as he apparently assumed them to be in the present case; because their Lordships, with all respect to the learned Chief Justice, take a view entirely different from that which he apparently formed, both as to the proper construction of the contested clause itself and as to the nature, significance and effect of Madame Falardeau's action.

In their Lordships' view the contested clause, when properly construed, means this: that Madame Falardeau, on payment of the sum of 200 dollars, acquired the option of requiring the respondents to execute a deed (titre de vente) conveying to her all their rights, property and interest in the emphyteutic lease for the residue of its term. And that when these two

J. C. 1920 LAMPSON v. CITY OF QUEBEC.

conditions had been fulfilled thereupon (alors) Madame Falardeau would enter into full proprietorship of the aforesaid immovable, subject always to the payment of the emphyteutic rent. The City of Quebec was bound to sell and convey to her their interest in the lease if she required them to do so. But that obligation was not reciprocal. She was not bound to purchase if she did not desire so to do.

The conclusion at which their Lordships have arrived as to the proper construction of the contested clause is in exact accordance with the opinion expressed by Pelletier and Lavergne and Anglin JJ., in the following passages in their judgments. Pelletier J. says: "L'acte que nous avons devant nous est un bail avec une clause déclarant que, au cas de l'accomplissement de deux conditions, Madame Falardeau pourrait devenir propriétaire; ces deux conditions sont: (1.) le paiement de 200 dollars par Madame Falardeau à la Cité de Québec; (2.) la passation d'un titre. La clause du bail citée plus haut dit que c'est alors, c'est-à-dire après l'accomplissement de ces deux conditions, que Madame Falardeau entrera en propriété de l'immeuble en question. Pour que Madame Falardeau serait devenue propriétaire, il fallait démontrer d'abord qu'elle avait payé les 200 dollars, et en second lieu que l'acte de transmission par la Cité de Québec à elle avait été passé." As put by Lavergne J.: "Madame Falardeau pouvait devenir propriétaire en vertu du bail et de ces conditions après avoir payé la somme de 200 dollars; secondement, par la passation d'un titre après l'exécution de ces deux premières conditions; il est dit dans le bail: 'c'est alors que Madame Falardeau entrera en pleine propriété de l'immeuble.' Il n'y a jamais eu de titre donné par la Cité de Québec à Madame Falardeau."

If this construction of the contested clause be its true construction, as their Lordships think it is, it appears to them to be wholly irrelevant to discuss the question whether or not a deed was necessary to pass the property to Madame Falardeau, for the obvious reason that she had bargained to get a deed, and the City of Quebec contracted to give it to her. They are bound to give her what they contracted to give her,

whether it be necessary or not. Madame Falardeau did not go into possession under or by virtue of an agreement to purchase. She went into possession under and by virtue of her sub-lease. She might never exercise her option to purchase. While that lease lasted she was bound to pay not only the rent reserved by the sub-lease, but also the rent reserved by the emphyteutic lease. She over-held no doubt after her term of two years had expired. The result of her over-holding is that a tacit renewal of the sub-lease took place for another year ; but if she continued liable in that character to pay the head rent to Lampson from time to time, any payments she made of that head rent therefore became wholly neutral facts ; because they were equally consistent with her having had vested in her all the interest in the emphyteutic lease the respondents could give her, of her being only entitled to the yearly tenancies mentioned.

The learned counsel for the respondents relied much upon the principle embodied in the Code that a deed was to be construed according to the intention of the parties to it, but he appeared to their Lordships to discard the necessary qualification to be observed in the application of this principle, namely, that the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself. The circumstances surrounding the making of a deed may, if it be ambiguous, give to its words a special meaning ; but if the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a court of justice and say : " Our intention was wholly different from that which the language of our deed expresses ; disregard what we said, and construe it according to what we meant to say, but did not say." The case of *Stevenson* v. *Rollitt* (1) was cited by the respondents' counsel in support of his contention. It does not support either of the propositions for which it was cited. The headnote runs : " A promise of sale with actual possession of the thing sold is not equivalent to sale,

(1) (1912) Q. R. 42 S. C. 322.

J. C. 1920 LAMPSON v. CITY OF QUEBEC.

and does not cause the property therein to pass, if the intention of the parties to the contrary appears from the terms of the contract. Hence, in a promise of sale, in which the price is made payable by instalments, a covenant that the parties will execute a deed of sale so soon as the two first instalments are paid is a suspensive condition upon the event of which only the sale is complete and property passes." Archibald J., the presiding judge, said (1): "In this instance, there is no resolutory condition. But there is, also, nothing to indicate that it was the intention of the plaintiff to deliver the property and to give actual possession thereof, until the title had been granted by the plaintiff."

This shows that it is the language of the contract which governs, and that a formality for which it stipulates must be observed, though not absolutely necessary to effect the end in view. In truth, what the parties quarrelled about in this case was the precise nature and extent of the physical immovable bargained for. Mrs. Falardeau insisted that the parcels demised by the emphyteutic lease embraced a certain passage. The respondents insisted it did not. She naturally insisted on getting what she supposed she purchased. The respondents naturally refused to convey what they contended they never contracted to sell. The language used by the respective parties in this controversy cannot be relied upon to alter the rights conferred by their written contract.

Their Lordships are of opinion that this appeal succeeds, that the judgment appealed from was erroneous and should be reversed and that of the Court of King's Bench of Quebec (Appeal Side) was right and should be affirmed, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellant in the appeal and in the Courts below.

Solicitors for appellant: *Stephenson, Harwood & Co.*
Solicitors for respondents: *Charles Russell & Co.*

(1) (1912) Q. R. 42 S. C. 322, 328.

Considered. BOILER, ETC., CO. OF CANADA v. SHERWIN-WILLIAMS CO. LD. [1951] A. C. 319

[PRIVY COUNCIL.]

CURTIS'S AND HARVEY (CANADA), LIMITED, IN LIQUIDATION . . . . } APPELLANTS ;

AND

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, LIMITED } RESPONDENTS.

J. C.*
1920
Oct. 19.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Insurance (Fire)—Explosion incidental to Fire—Warranty—Quebec statutory Conditions—Variation proposed by Insured—Quebec Insurance Act (R. S. Queb., 1909), *arts.* 7034–6.

By the Quebec Insurance Act (R. S. Queb., 1909), arts. 7034–6, certain conditions are, as against the insurer, to be deemed part of every contract of fire insurance, and no variation of them is to be binding upon the insured unless it is printed upon the policy in the manner prescribed by the Act.

The appellants were insured by the respondents against fire in respect of buildings forming part of a manufactory of tri-nitro-toluol (T.N.T.), a material liable to explode when subjected to fire. The policy contained the following warranty: "Warranted free of claim for loss or damage caused by explosion of any of the materials used on the premises." These words appeared upon the slip by which the appellants proposed the insurance, but were not printed on the policy in the manner prescribed for a variation. By statutory condition 11 the respondents were to be liable for all "loss caused by any explosion." A fire broke out upon the insured premises and ten minutes afterwards there was an explosion of T.N.T., the building in which it occurred being wrecked and burning material blown about; further fires ensued and then from time to time further explosions; in the end practically the whole of the insured buildings were destroyed either by fire or explosion. The appellants sued the respondents upon the policy:—

Held, (1.) that, subject to the requirements of the Act, the warranty applied to loss by any explosion, not merely to loss by an explosion originating a fire to cover which the insurance was extended by the statutory condition; (2.) (reversing the Court of King's Bench) that a variation of a statutory condition not printed in the prescribed manner was invalid, although it had formed part of the insured's proposal; but (3.) that the warranty was valid so far as it excluded loss caused by an explosion incidental to a fire, since the statutory condition referred

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and Mr. JUSTICE DUFF.

J. C.

1920

CURTIS'S AND HARVEY (CANADA) v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

only to loss by explosion originating a fire; and (4.) that an inquiry into the loss due respectively to fire and explosion was rightly ordered.

Judgment of the Court of King's Bench affirmed.

Stanley v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71; *Hobbs v. Guardian Assurance Co.* (1886) 12 Can. S.C.R. 631; and *In re Hooley Hill Co. and Royal Insurance Co.* [1920] 1 K. B. 257 approved.

APPEAL from a judgment (September 18, 1919) of the Court of King's Bench (Appeal Side), reversing a final judgment (February 13, 1919) of the Superior Court, and two interlocutory orders of that Court.

The appellants sued the respondents in the Superior Court upon a policy of insurance against fire for 35,000 dollars. They alleged that the greater part of the insured property had been destroyed by fire and they claimed the sum of 32,976 dollars as the proportion due from the respondents under their policy. The facts of the case together with the material terms of the policy and of the relevant provisions of the Quebec Insurance Act are stated in the judgment of their Lordships.

The trial judge (Maclennan J.) gave judgment for the amount claimed. He found that the direct and efficient cause of the loss was fire, and that the explosions which followed were incidents of the fire. He held that the warranty and the variation of statutory condition 11 were both invalid in that they were not printed in the manner prescribed by the Quebec Insurance Act (R. S. Queb. 1909), art. 7055.

The Court of King's Bench (Appeal Side) set aside the judgment and remitted the case for the purpose of further evidence being adduced as to the loss arising respectively from fire and explosion.

Lamothe C.J. was of opinion that the requirements of art. 7035 applied only in the case of variations imposed by an insurer without the previous consent of the insured, and that the warranty and the variations of condition 11, were demanded by the appellants. Carroll and Pelletier JJ. agreed with that view of the law; they were also of opinion that the variation of condition 11 was printed as required and was reasonable. The Chief Justice and Carroll J. agreed

with the view of the trial judge that the explosion occurred some minutes after the breaking out of the fire and as an incident of it. Pelletier J., however, doubted whether the fire was not caused by the material upon the premises. Lavergne J. concurred in the judgment of the Court.

The proceedings on appeal are reported at Q. R. 29 K.B. 254.

Upon the appellants appealing to His Majesty in Council the respondents obtained special leave to cross-appeal on the ground that judgment should have been entered for them.

1920. July 9, 12, 13, 15. *Sir John Simon K.C.* and *P. S. Bateman K.C.* (*H. J. Douglas* and *M. Alexander* with them) for the appellants. The evidence and the judgments in Canada establish that the explosion was not the cause of the fire but an incident of it. That being so neither condition 11 nor the explanation to it affect the matter. The warranty not being printed in the manner required by art. 7035 of the Quebec Insurance Act is invalid under art. 7036; the ground upon which the King's Bench held that art. 7035 did not apply is not tenable. But even if the warranty is valid it does not limit the liability of the respondents in this case. Upon a simple policy against fire the liability extends to loss by an explosion which is incidental to the fire: *Hobbs* v. *Guardian Assurance Co.* (1); *In re Hooley Hill Co. and Royal Insurance Co.*, per Scrutton L.J. (2) Statutory condition 11 extends the liability to loss by explosions which cause a fire. The warranty qualifies that extended liability, but does not affect the prima facie liability under the policy. It means merely that the respondents are not liable for loss by a fire originated by an explosion of material. Neither *Stanley* v. *Western Insurance Co.* (3) nor the decision in the *Hooley Hill Co.'s Case* (4) affect the present question. Both those cases were decided upon clauses which operated as exceptions, whereas condition 11 enlarges the liability under the policy.

[Reference was also made to *Citizens Insurance Co.* v.

(1) 12 Can. S. C. R. 631.
(2) [1920] 1 K. B. 257, 272.
(3) L. R. 3 Ex. 71.
(4) [1920] 1 K. B. 257.

J. C. 1920

CURTIS'S AND HARVEY (CANADA) v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

Parsons (1); *Wanless* v. *Lancashire Insurance Co.* (2); and *Wheeler* v. *Phenix Insurance Co.* (3)]

R. A. Wright K.C. and *J. A. Mann K.C.* (*G. Lawrence* and *R. A. Bateman* with them) for the respondents. The warranty appeared upon the slip by which the appellants proposed the insurance, its inclusion substantially reducing the premium payable; it was therefore effectual although not printed in the manner required by the Act for a variation of a statutory condition. Art. 7035 refers in terms only to cases in which "the insurer desires to vary the conditions." Under art. 2481 there was a contract of insurance including the warranty upon the acceptance of the terms in the slip. The statutory conditions apply to the risk which the parties have agreed to be insured, but do not prevent the parties from expressing otherwise than in the special manner provided what that risk is to be. The language of arts. 7034–6 shows that the intention of the enactment is to protect the insured from conditions which he has no proper opportunity to consider. The warranty cannot be construed as applying only to explosions incidental to a fire, it refers in terms to all explosions. Its effect is to relieve the respondents from loss by explosion whether it was the originating cause of the fire or an incident of it: *Stanley* v. *Western Insurance Co.* (4); *In re Hooley Hill Co. and Royal Insurance Co.* (5); *Cory* v. *Burr* (6); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (7) But even if art. 7035 applies to a term which is part of the insured's own proposal, the warranty is valid so far as it applies to explosions incidental to a fire. To that extent it does not vary the statutory condition, for that applies only to explosions originating a fire. Upon their cross-appeal the respondents are entitled to judgment since the evidence did not establish what loss, if any, was due to fire.

Sir John Simon K.C. replied.

(1) (1881) 7 App. Cas. 96.
(2) (1896) 23 Ont. A. R. 224.
(3) (1911) 203 N. Y. 283, 287.
(4) L. R. 3 Ex. 71.
(5) [1920] 1 K. B. 257.
(6) (1883) 8 App. Cas. 393.
(7) [1918] A. C. 350.

Oct. 19. The judgment of their Lordships was delivered by

LORD DUNEDIN. Though this is an important case, both in respect of the amount which is at stake and from the fact that it has given rise to a difference of judicial opinion, yet the facts out of which the question arises are capable of being set forth with great succinctness.

The appellants are manufacturers of explosives and are the owners of works in which such explosives are made, and in particular, they were engaged in the manufacture of tri-nitro-toluol (hereinafter referred to as T.N.T.). They wished to insure their works against fire, and through their brokers they sent to the respondents, the North British and Mercantile Insurance Co., a slip on which were typewritten their requirements for insurance. These consisted of a specification of the various buildings wished to be insured, with the addition of terms on which they wished the insurance to be granted. Upon this the respondents issued a policy. The policy consisted of a printed form giving the general words of insurance against fire, leaving a blank for a specification of the premium, and leaving a large blank for the specification of the subject insured. This latter blank was filled up by pasting in a slip, or, as it is locally termed, an "allonge," which was a typewritten paper exactly echoing the proposal made by the broker. On the back of the form are the printed statutory conditions which, according to the law of Quebec, must be printed on every policy, and to which fuller reference will be presently made.

A fire took place in one of the buildings insured in which there was a nitrator, which is a machine employed in one of the stages of the manufacture of T.N.T. From this building the fire extended to the adjoining building, in which there was some T.N.T. Ten minutes after the inception of the fire, an explosion occurred of the T.N.T. That building was wrecked and burning material blown about. Further fires ensued, and then from time to time further explosions. In the end practically the whole of the insured buildings were, whether by explosions or by fire, totally destroyed.

The appellants sue upon the policy for the whole amount,

J. C. 1920 CURTIS'S AND HARVEY (CANADA) v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

subject to the adjustment which is necessary in respect of there being other insurances in other policies on the same subject. The respondents admit their liability for damage by fire, but contend that they are not liable for damage attributable to explosion, and aver that the greater part of the damage was in fact so caused. Proof was led in which the facts, which have been summarized, were elicited.

It is now necessary to set forth the clauses of the policy on which the question of law depends. The insurance is expressed to be against fire. In the slip or allonge there is the following clause: "Warranted free of claim for loss or damage caused by explosion of any of the material used on the premises."

No. 11 of the statutory conditions is as follows: "11. The Company shall make good loss caused by the explosion of gas in a building not forming part of gasworks, and all other loss caused by any explosion causing a fire and all loss caused by lightning, even if it does not set fire."

The Revised Statutes of Quebec, 1909, enact the following articles:—

"7034. The conditions set forth in this article shall, as against the insurer, be deemed to be part of every contract of fire insurance entered into or renewed on or after February 10, 1909, in the Province, with respect to any property therein, or in transit therefrom or thereto, and shall be printed on every such policy with the heading, 'Conditions of the Policy,' and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured unless evidenced in the manner prescribed by arts. 7035 and 7036.

7035. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added to the contract containing the printed statutory conditions, words to the following effect, printed in conspicuous type and in ink of a different colour: 'VARIATIONS IN CONDITIONS.' This policy is issued on the above conditions, with the following variations and additions. [Set forth the conditions.] These variations are made by virtue of the Quebec Insurance Act, and shall have effect in

so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable requirements on the part of the Company.

7036. No such variation, addition or omission shall, unless the same is distinctly indicated as set forth in art. 7035, be legal and binding on the insured."

The above quoted warranty contained in the allonge is not printed in red ink. There is, however, inserted in red ink the following variation of condition 11: ". . . . Add the following clause as explanatory of the Company's actual liability under Clause 11: This Company is not liable for loss caused by explosions of any kind, unless fire ensues, and then for loss or damage by fire only; nor for loss or damage to any electrical machinery, appliances or equipment, unless fire ensues, and then to include the loss or damage caused by fire only."

The respondents contended that in respect of the clause of warranty above quoted they are not bound to pay for any damage caused by explosion. The learned trial judge found for the appellants, and held that the warranty clause was bad, first because it was a variation of the statutory conditions not properly authenticated, and second, because in itself it was unreasonable. The appellate Court reversed that judgment, and ordered inquiry as to how much damage was caused by explosion and how much by fire, the evidence as led not having been directed so as to clear up this point. Appeal has now been taken to this Board.

There are two questions accordingly which fall to be decided. The first is, what is the proper construction of the clause of warranty? The second is, if on a proper construction of the clause the respondents are not bound to pay any loss caused by explosion, then is the clause binding on the appellants in respect either (*a*) that it is not properly authenticated or (*b*) that it is in itself unreasonable?

It may be well here to set out what is the state of the decisions on questions which nearly touch the point. In *Hobbs* v. *Guardian Assurance Co.* (1) the Supreme Court

(1) 12 Can. S. C. R. 631.

J. C. 1920 — CURTIS'S AND HARVEY (CANADA) v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

of Canada decided that a policy which insured against fire covered all loss caused by explosion which was an incident of the fire—i.e., when a fire began without an explosion and an explosion took place during its course and was caused by it. Scrutton L.J. in *In re Hooley Hill Co. and Royal Insurance Co.* (1) expressed an opinion to the same effect. Their Lordships agree with the reasoning of the learned judges in *Hobbs' Case.* (2) That is an authority on what an insurance against fire covers. *Stanley* v. *Western Insurance Co.* (3) was a case which explained an exception. In that policy, which was against fire, the insurer, in terms of the policy, was not to be liable for loss or damage by explosion. This expression was held to cover all loss by explosion, whether the explosion succeeded to or was caused by a fire, or was prior to and caused a fire. *Stanley* v. *Western Insurance Co.* (3) was followed by the English Court of Appeal in *In re Hooley Hill Co. and Royal Insurance Co.* (1) already cited. These cases are not actually binding on their Lordships, but they agree with them. *Stanley's Case* (3) was decided by a very strong Court, and has stood as the law of England for many years.

Now were the policy here simply a policy against fire, with the warranty added, the case would be ruled in terms of the decision in *Stanley's Case.* The only distinction that can be drawn is that here the policy is not simply against fire, but that there is adjected the statutory condition 11. The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree with the arguments of the appellants' counsel that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability. Statutory condition 11 may, therefore, be taken to fill up the lacuna left by *Hobbs' Case* (2); that is, to make it clear that when the original

(1) [1920] 1 K. B. 257, 272. (2) 12 Can. S. C. R. 631.
(3) L. R. 3 Ex. 71.

cause of fire is explosion the damage must be made good by the insurer. The question, therefore, resolves itself into this. When the assured said he would be content that the insurer should not be liable for any loss caused by explosion of the material used on the premises, was he contracting to that effect in view of the sum total of the liabilities under the policy, or was he merely contracting as to the additional liability imposed by condition 11?

It must be remembered that these were T.N.T. works. It is true that T.N.T. may be consumed without being exploded; it may simply burn without its occasioning an explosion in either the popular or scientific sense. As to what is the true meaning of the word "explosion," the parties have been content to leave the Court without any means of judging this from the scientific point of view. Their Lordships do not think they are entitled to read in any knowledge which they may as individuals possess on the subject, but are bound to take it that the parties are agreed to take the word in the popular sense, in which sense it has been used in the résumé of the facts given above. But while T.N.T. might burn it might also explode, and it seems to their Lordships impossible to come to any conclusion but that the parties must have contemplated the possibility of an explosion either as an incident or as an originator of fire. It is obvious that if the assurer was content to have this possible risk barred, he would secure an insurance on better terms. When, therefore, he used in his proposal and the insurer accepted in the policy, words which are absolutely general, and in no way limited, their Lordships think that the more natural construction is to apply the words of exception to the whole risks in which explosion takes a part rather than to confine them to the one special case provided for by statutory condition 11, to which no reference is made.

The next question to be decided is whether the construction of the warranty, being as above, it is itself struck at by the provisions of art. 7036. The learned judges in the Court below have held that in respect that art. 7035 specified the insurer as the person who may be desirous to vary the

J. C.
1920
CURTIS'S AND HARVEY (CANADA) v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

condition, the clause does not apply in cases where, as here, the insured proposed the variation, which was accepted by the insurer. Their Lordships are unable to agree with this view of the statute. Art. 7036 is quite peremptory in its terms. Their Lordships think that it is the policy of the statute to make a hard-and-fast rule that every fire policy shall have attached to it these statutory conditions, and that they cannot be varied so as to be binding on the insured, unless the variations are authenticated in the prescribed manner. The result will be that, if not varied, they remain in full force, but any other stipulation and covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are paramount. Applying this view to the question in hand, the insurers are warranted free from explosions of every sort except such explosion as is provided for by statutory condition 11. Now statutory condition 11, as already stated, only deals with an explosion originating a fire, and does not deal with the case of an explosion incidental to a fire. It follows that the present case is not touched by statutory condition 11, and the warranty free from explosion can have effect. This leads, though by a different line of reasoning, to the same result as reached by the learned judges of the King's Bench on the appeal. Their Lordships need only add that they agree with the appellate Court, differing from the trial judge that the condition is not in itself unreasonable.

Two minor matters forming the material of interlocutory judgments must be mentioned, as they enter into the judgment of the appellate Court, though they were not made a matter of argument before their Lordships. Their Lordships consider that the trial judge was right in striking out a paragraph which proposed to adduce evidence as to the intentions of parties antecedent to the issue of the policy. The matter of the other interlocutory judgment is somewhat obscure. If, as Maclennan J. thought, it was only a renewal in another form of the motion already dealt with, no more need be said. If, on the other hand, it was a plea which would destroy the

contract on the ground of its being ultra vires of the company, there is, in the view of their Lordships' decision on the merits, no necessity to discuss it. Their Lordships, therefore, think that the judgment of the King's Bench should be varied by striking out from the operative final paragraph such part as deals with the interlocutory judgments, but so far as it directs inquiry into the question of loss due respectively to fire and explosion, should be affirmed, and that the respondents should have the costs of this appeal.

The respondents on June 11, 1920, obtained special leave to cross-appeal in each action, on the ground that the judgments of the Court of King's Bench should have directed judgment to be entered for them. It follows from this judgment that these cross-appeals ought to be dismissed and the appellants are entitled to their costs in respect of them. These costs should be set off against the costs which the appellants are directed to pay to the respondents in the main appeals.

Their Lordships will humbly advise His Majesty to the foregoing effect.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Trower, Still, Parkin & Keeling.*

[PRIVY COUNCIL.]

J. C.* 1920 Oct. 19.

PRÉSIDENT ET SYNDICS DE LA COMMUNE DE LAPRAIRIE . . . . } APPELLANTS ;

AND

COMPAGNIE DE JÉSUS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Common—Grant by Seigniors to Inhabitants—French Law—Validity—Construction—Extraneous Evidence—Power of Inhabitants to alienate—Cons. Stats. L. C., 1861, *c.* 41.

In 1694 the owners of a seigniory granted land to the present and future inhabitants of a village and of certain adjoining districts for a common. The land was granted in terms appropriate to a feudal grant by seigniors to censitaires, but the deed contained provisions which made it very doubtful whether more than a right of user passed. Agreements made in 1705 and 1724, to which some of the inhabitants who signed the deed of 1694 were parties, the same notary as in that case being employed, were based upon the view that the seigniors could alienate the land with the consent of the inhabitants. By the agreement of 1724 "the greater part of the inhabitants" purported to concede to the seigniors the right to grant building lots (emplacements) out of the land. The boundaries of the common had been ascertained and fixed under an Act of 1822:—

Held, (1.) that under the French law applicable the grant was not invalid by reason of being made to a fluctuating body; (2.) that in construing the deed it was permissible in the circumstances to take note of the agreements, and that the inference from them was that the deed passed only a right of user; and (3.) that it was doubtful whether the agreement of 1724 was binding upon the inhabitants generally, or was even one which they could make, but that in any case the right conceded was extinguished by the delimitation of the common under the Act of 1822, and was also inconsistent with the Seigniorial Act (Cons. Stats. L. C. 1861, c. 41).

Judgment of the Court of King's Bench reversed by holding (3.), but otherwise affirmed.

APPEAL from a judgment (April 28, 1916) of the Court of King's Bench for the Province of Quebec (Appeal Side), upon questions submitted to that Court under 3 Geo. 5 (Queb.), c. 76, relative to the respective rights of the parties in the

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and Mr. JUSTICE DUFF.

Common of Laprairie de la Magdeleine. The questions submitted, the facts of the case, and the effect of the judgments in the Court of King's Bench appear from the judgment of their Lordships.

1920. July 5, 6, 8. *Geoffrion K.C.* and *Letourneau K.C.* for the appellants.

Hon. Sir M. Macnaghten K.C. and *St. Jacques K.C.* for the respondents.

In addition to authorities mentioned in the judgment reference was made to the Civil Code, arts. 1472, 499, 547; Seigniorial Questions, vol. A, answers of Supreme Court to questions 5, 8, 39; Pothier, Œuvres (ed. Bugnet), vol. 3, p. 216; Pothier, Vente, Part II., ch. 1, s. 2; Consolidated Statutes L. C., 1861, c. 41, s. 7, sub-ss. 2, 63, 65, 90.

Oct. 19. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec rendered under 3 Geo. 5 (Queb.), c. 78, whereby it was provided that the respective rights of the respondents, the Society of Jesus, and of the persons having rights in the Laprairie common in the Province of Quebec should be determined by that Court subject to the appeal provided by law.

The material facts may be shortly stated as follows: The Jesuit Fathers were the owners, under a grant made by the French Government in 1647, of the seigniory of Laprairie de la Magdeleine. In the year 1694 the Jesuit Fathers made a grant of about 3000 arpents of land in the neighbourhood of the village of Laprairie, being part of the lands belonging to the seigniory, to the inhabitants of Laprairie and of certain neighbouring districts for a common. In 1724 an agreement was made between the inhabitants and the Jesuit Fathers authorizing the latter to grant, out of the common land, "emplacements" or building lots for the extension of the village. After the cession of Canada to England in 1763 the Jesuits gradually disappeared from the country, and on the

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

death of the last of them, in or about 1800, their seigniories escheated to the Crown. In 1817, the common having become derelict and the village requiring extension, the inhabitants petitioned the Crown authorities, with the result that in the year 1820 a part of the common, defined in a plan drawn by the Crown Surveyor, M. Saxe, was set aside by the Crown for building. In 1822 an Act (2 Geo. 4, c. 8) provided for the election by the commoners of a president and syndics to define and regulate the common. This Act was from time to time continued, and was ultimately rendered permanent, and the appellants are the president and syndics elected under that Act. In 1867 the Crown rights in the common passed, under the British North America Act of that year, to the Province of Quebec. By an Act of 1887 (50 Vict. (Queb.) c. 28) the Jesuit Fathers were incorporated as La Compagnie de Jésus, being the respondent corporation. In 1888 the Governor of the Province, acting under the authority of an Act passed in that year respecting the settlement of the Jesuit estates (51 & 52 Vict. (Queb.), c. 13), ceded to the respondent corporation all the rights of the Province in Laprairie common. The result of the above transactions was that as from 1888 the respondents became the owners of all rights in the common formerly belonging to the Jesuit Fathers, subject to the grant of 1694.

Shortly after the events last mentioned it was ascertained that the soil of the common was suitable for brick-making, and questions arose as to the rights of the respondent and the commoners in the soil. By a series of statutes passed by the Legislature of Quebec permission was given to alienate certain parts of the common for that purpose, the rights of all parties interested being reserved. Ultimately, by the above-mentioned Act of 1912 (3 Geo. 5 (Queb.), c. 78), provision was made for the ascertainment of the rights of the parties by means of questions to be submitted to and answered by the Court of King's Bench (Appeal Side), subject to an appeal to this Board, and the appellants were authorized to represent the persons having rights in the common before all Courts for the purposes of the Act.

The questions submitted to the Court, as settled by Lafontaine J. under the Act of 1912, were as follows: "1. What are the respective rights of the Society of Jesus and of the parties entitled to the common in the said Common of Laprairie? 2. Do any particular rights exist as regards the lands immediately adjoining the Common of Laprairie, and, if so, what are they and what lands are affected by those rights? 3. Is the deed passed on November 30, 1724, before Mtre. G. Barrette, N.P., still in force, and, if so, what are the rights which result from it?"

The replies to the above questions, as rendered by the majority of the Court (Sir Horace Archambeault C.J., and Lavergne, Carroll and Pelletier JJ.) were as follows: "To the first question; The Society of Jesus has over the Common of Laprairie a right of domaine direct, a right of ownership of the soil and sub-soil, a right to the strands, rivers, timber and quarries, as well as to the rent of 30 'sols' for each inhabitant who puts beasts upon it. There can be no difficulty as regards the timber, for it no longer exists. The commoners (les ayants-droit de commune) have the co-ownership, limited to the right of pasturage for their beasts and to enjoyment for communal purposes only, without being able to dispose of these rights without the consent of the seigneur. The replies to the second and third questions must be identical; the Reverend Jesuit Fathers have the right to cede building lots (emplacements) for the purpose of enlarging the village or the town of Laprairie from this time forward. The application of the deed is without restriction as to time."

Cross J. dissented from the above decisions and expressed his opinion as follows: "I would therefore say, in answer to the first question, that the ownership of the land of the common was and is vested in the commoners, subject to the claim of the Company of Jesus to thirty sols per year from each head of family and the right to stumpage mentioned in the deed of 1694. . . . . In answer to the third question, I would therefore say that the Society of Jesus is entitled to sell for its own profit and account any of the lots shown on the Saxe

J. C. 1920 — LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

plan of 1820 for village extension which may remain unsold and of which the Crown in right of the province of Quebec was in possession on November 5, 1889. In so far as not answered by the answer to the third question, the second question could relate only to the strip of one arpent outside the village reserved by the grantor in the deed of May 19, 1694; but that strip, never having formed part of the common, is not now in question, and the second question need not therefore be answered."

Against the decision of the majority of the Court the present appeal is brought.

From the above statement it is obvious that the decision on the first question must depend mainly upon the construction of the grant of 1694, and accordingly it is to the terms of that grant that the greater part of the argument before their Lordships has been addressed. The grant is contained in an "Acte" passed before a public notary, Maître Adhémar, on May 19, 1694, and found among his records in the archives of the Superior Court of Montreal. It is headed: "Vente par le R. P. Levaillant, S.J., gérant les affaires de la Seigneurie de Laprairie aux Sieurs Pierre Gagnié et autres pour les habitants de Laprairie de la Magdeleine"; and, after recording the presence of the Reverend Father François Levaillant, Superior of the Residence of Ville-Marie, managing the affairs of the Seigniory of Laprairie de la Magdeleine under authority granted by the Superior General of the Jesuit Fathers in New France, the grant proceeds as follows: "Lequel audit nom a volontairement donné et concédé et par ces présentes donne et concède à titre de cens et rentes seigneuriales dès maintenant et à toujours, promis et promet garantir de tous troubles et empêchements généralement quelconques aux habitants de Laprairie de la Magdeleine, qui y sont prést habitués et à ceux qui s'y habitueront par la suite, ensemble à ceux habiteront à la coste de la Tortue et depuis la Coste de la Tortue jusques à la Commune de la Prairie St. Lambert, à la fourche, et à Fontarabie; les sieurs Pierre Gaignier, Claude Carron, Jean Caillaud Caron, Etienne Bisaillon, Charles Deno,

faisant pour eux et pour les autres habitants dudit lieu de la Prairie de la Magdeleine habitués en vertu du pouvoir qu'ils ont d'eux, reçu en mon estude, et ceux qui s'y habitueront auxdites costes de la Tortue, la fourche et Fontarabie, à ce prést. et acceptant pour eux leurs hoirs et ayant cause à l'avenir ; la consistance de terre," etc. [here follows a description of the land]. "Ce réservant ledit révérend père Levaillant audit nom, l'entier village, comme il est de prést. et un arpent de terre tout au tour du village et au dehors dudit fort, pour en faire ce que bon luy semblera sans que ledit arpent réservé hors dudit fort et joignant les pieuds d'iceluy puissent préjudicier auxdits habitants habitués et à habituer dit lieu à passer et faire passer leurs bestiaux pour aller sur les d. cy-dessus données et concédées. Lesquelles ledit révérend père Vaillant audit nom a données et concédées aux d. habitants pour leur service de commune, sans que ledit révérend père audit nom soit exclus de fre. paccager dans ladite commune les bestiaux qu'ils auront ou leurs fermiers qui sont ou seront sur lesdits lieux ci-dessus déclarés, et sans que lesdits révérends pères ny leurs fermiers soient obligés de contribuer à aucuns travaux sur la dite commune. Tenant ladite consistance de terre," etc. [here follow the boundaries]. "Pour de la dite consistance de terre cy-dessus donnée jouir par lesdits habitans habitués et à habituer aux dits lieux cy-dessus déclarés comme à eux appt. aux moyen des préstes. sans qu'ils en puissent vendre part ny partie ny l'employer en autre usages qu'une commune sans le consentement exprès des dits révérends pères Jesuites. Est expresst. convenu qu'il sera loisible auxdits révérends pères et habitans habitués et à habituer de prendre dans ladite Commune, du bois pr. fr. planches, madriers et bois de charpentes et autre bois quy leur seront nécessaires pour se bâtir pour eux seulement : et en cas qu'eux ou d'autres personnes y prennent du bois pour vendre, seront tenus de payer vingt sols par chaque pied d'arbre qu'ils abbattront dans ladite Commune, lequel argent sera employé au profit d'icelle dite Commune. A la charge que lesdits hab. des lieux habitués et à habituer seront tenus de paier par chacun ou" [? an] "aux dits révérends pères

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

Jesuites ou au porteur des préstes. trente sols par chaque habitant en chef de famille, qu'ils seront tenus de paier comme dit est aux dits révérends pères au premier jour de décembre en argent monnoyé, dont le premier payement escherra et se fera au dit jour premier décembre prochain au dit lieu de la Prairie de la Magdeleine, et ainsi continuer de là en avant et à perpétuité. Et faute par lesdits habitants quy auront des bestiaux de paier les dits trente sols par chacun an seront deschus du dit droit de Commune. Et le d. R. père Vaillant et le dit Caillaud ont convenu, attendu que par le bail de ferme à luy fait des terres des d. révérends pères. La sus dite concédée ou partie est incorporée dans la dite ferme, le révérend père luy cède la moitié du revenu de la dite Commune pour le temps qui luy reste à expirer de son bail, sans qu'il puisse prétendre autre disminution et sans diminution du prix porté en son bail."

The deed was signed by Father Levaillant and the five representatives of the inhabitants above named in the presence of witnesses, as well as by the notary.

Before considering in detail the construction of the above deed, it appears to be desirable to consider a contention raised on behalf of the respondent corporation during the argument—namely, that by the law of Quebec no grant of proprietorship could be made to a fluctuating body of inhabitants. In their Lordships' opinion this contention is unfounded.

The subject is dealt with by Denisart ("Collection de Décisions Nouvelles," Paris, 1786), who says: "Le mot 'communes' a deux acceptions principales. Il signifie d'abord une sorte de société que les habitans d'une même ville, d'un même bourg, d'un même lieu, commencèrent à former en France sous le regne de Louis VI., au douzième siécle, de l'agrément du souverain, avec pouvoir de s'assembler, de se choisir des officiers, de se cotiser pour les besoins de la société. Nous en avons parlé au mot 'Communauté d'habitans.' On nomme en second lieu 'commune' ou 'communaux,' des terres qui appartiennent à une communauté d'habitans, et dont les habitans jouissent

ordinairement en commun." (Vol. iv., p. 746, tit. "Commune.")

Thus the word "commune" was used sometimes as signifying the general body of inhabitants of a town or village, who were treated as a quasi-corporation capable of owning land or other property, and at other times as signifying the property owned by such a community. In the former sense it was also referred to as a "communauté d'habitans," and such a "communauté" was authorized to elect officers (generally known in rural communities as syndics), and to hold general meetings or "assemblées d'habitans." Such a community could be formed without letters patent. (Vol. iv., p. 728, tit. "Communauté d'habitans.")

To the same effect is Merlin (Répertoire de Jurisprudence, ed. 1812, vol. ii., p. 587, tit. "Communauté d'habitans"), who says: "Les communautés d'habitans possèdent en certains lieux des biens communaux, tels que des maisons, terres, bois, prés, pâturages, dont la propriété appartient à toute la communauté, et l'usage à chacun des habitans, à moins qu'ils ne soient loués au profit de la communauté, comme cela se pratique ordinairement pour les maisons et les terres; les revenus communs qu'ils en retirent, sont ce que l'on appelle les deniers patrimoniaux." He adds that such communes cannot acquire land without the previous authorization of the Government (Ibid., and see vol. vii., p. 606, under the title "Mainmorte"); but such an authorization may be presumed after so long a period.

It is stated by Denisart (vol. iv., p. 747) that the word "commune" is not properly applied to land over which a community of inhabitants have limited rights of usage, but only to land of which it is the proprietor; but according to Merlin (vol. ii., p. 592, tit. "Communaux") the distinction was not always observed, for he says: "Remarquez néanmoins que fréquemment on appelle aussi Communaux les biens qui ne sont tels qu'à titre d'usage, et dont les communes n'ont pas la propriété foncière. Cette manière de parler s'est même glissée dans nos lois."

Turning now to the construction of the deed of 1694, with

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

particular reference to the question whether it passed to the inhabitants of Laprairie the proprietorship of the soil or only the right of user, it is plain that the language used in the early part of the deed, if taken alone, would be in favour of the former view. The words, "donne et concède à titre de cens et rentes seigneuriales," with which the grant commences, are appropriate to a feudal grant by seigneur to censitaire (see the Decisions of the Courts of Lower Canada on Seigniorial Questions (1856), vol. A, p. 126a, et seq.); and the same may be said of the initial words of the habendum (as it would be called in English Law)—namely: "Pour de la dite consistance de terre cy-dessus donnée jouir par lesdits habitans habitués et à habituer aux dits lieux cy-dessus déclarés comme à eux appartenant au moyen des présentes."

But it is necessary, as pointed out by Carroll J., when stating the reasons for the judgment of the majority of the Court, to consider the other expressions used in the deed and to construe the document as a whole. No safe inference either way can be drawn from the fact that the grant is made to the inhabitants "pour leur service de commune," for the word "commune" is (as appears by the above quotation from Merlin) used sometimes as indicating proprietorship and sometimes with reference to a right to profits only. But there are other elements in the deed which point to the conclusion that something less than full proprietorship was intended to pass. The grant is not made to the inhabitants of Laprairie only, but to them and the inhabitants of other neighbouring districts. The words prohibiting sale or use for any purpose other than as a common "sans le consentement exprès des dits Révérends Pères Jésuites," are incompatible with proprietorship, and are inadequately explained by the fact that a right of pasture is reserved to the seigneurs. The grant to the inhabitants of a right to cut timber was unnecessary if they were to own the soil. The reservation of a rent or payment of thirty sols a year for each inhabitant who is the head of a family would not fall under the ordinary description of "cens et rentes" and tends to show that the seigneur was to retain something more than the "dominium

directum" only. And lastly, the provision that, on the default of any inhabitant holding cattle in paying the thirty sols a year, those inhabitants "seront deschus du dit droit de commune," is hardly explicable on the theory that the soil passed to the inhabitants; for the obligation of a commoner to pay this sum to the seigneur would be inadequately secured by the penalty of a forfeiture of common rights in favour of other commoners. The effect of these considerations is to throw great doubt upon the inference which might otherwise be drawn from the initial words of the grant and the habendum, and to give weight to the argument that the deed passes no more than a right of user.

In view of the ambiguity of the grant, it is permissible to take note of the manner in which it was construed at or about the time of its execution; and accordingly reference may be made to certain agreements entered into before the same notary in 1705 and 1724, to which some of the inhabitants who signed the deed of 1694 were also parties. By a convention entered into between the Jesuit Fathers and a number of inhabitants of Laprairie on January 21, 1705, and found among the notarial acts of Maître Adhémar, it was agreed that the Jesuit Fathers should be at liberty to dispose of four arpents of the common on the terms of replacing them by other land of equal extent; and by another convention entered into by a meeting of inhabitants of Laprairie with the Jesuit Fathers on November 30, 1724 (to which more particular reference will be made hereafter), it was agreed that the Jesuit Fathers and their successors should be at liberty to grant as building lots (concéder pour emplacements) such parts of the common as might be required for that purpose. In each of these agreements it is assumed that, subject to the consent of the commoners, the seigneurs are in a position to alienate the soil. These agreements, therefore, support the view that the soil had not passed under the grant of 1694, but was still vested in the seigneurs.

Reference may also be made to the Act of 1822 (2 Geo. 2 (Queb.), c. 8), by which the management of the common was entrusted to the appellants. By that Act it is recited that

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

"Certain of the inhabitants of the village and seigneurie of La Prairie de la Magdeleine, in the county of Huntingdon, are in possession of a common," which is described, and that "the general benefit of the proprietors of the said common and of the inhabitants of the said village and seigneurie of La Prairie de la Magdeleine would be materially promoted if provision were made for the well ordering of the said common," thus distinguishing the proprietors of the common from the inhabitants of the village. Provision is then made for the election by the inhabitants "entitled to the benefit of the said common" of a chairman and four trustees (président et syndics) to "manage and direct the business relating to the said common," and such trustees are incorporated by the name of the appellants. The trustees are to cause the common to be surveyed and the limits thereof to be ascertained and fixed by a surveyor; but the Commissioners representing the Crown (in which the seigniorial rights were then vested) are authorized to appoint a surveyor to act jointly in making the survey, and no survey or act of the trustees or their surveyor is to be valid or binding unless agreed to or ratified by the Commissioners, their surveyor or agent. The Act also requires the trustees to ascertain the "persons having any pretensions to right of common in the said common of Laprairie," and to determine the number of horses and cattle which shall be allowed to graze upon the common. No provision is made for vesting the common in the trustees. The recitals and provisions of this statute appear to recognize a substantial interest in the common as being still vested in the seigneurs; and some of the expressions used are inconsistent with the view that the soil had passed to the commoners.

Upon the whole, and having regard to all the above considerations, their Lordships are not satisfied that the deed of 1694 vested the proprietorship of the common in the inhabitants, and accordingly they do not differ from the conclusions of the Court of King's Bench as to the reply which should be given to the first question.

The meaning of the second question is obscure. If, as the Court appears to have thought, it was intended only to raise

the point which is more specifically raised in the third question, it is unnecessary to reply to it. But if some other point relating to lands adjoining the common was intended to be raised, then the question is not formulated with sufficient clearness, nor are the facts sufficiently stated, to enable a reply to be given. In these circumstances it appears to their Lordships that this question should be left unanswered, leaving it to the parties to formulate the question again in the "clear and distinct manner" required by the Act of 1912 if they should desire to do so.

The third question relates to the Acte or agreement of 1724 to which reference has already been made for another purpose, and it is desirable now to state in more detail the nature of that document. It is headed: "Procès-verbal d'une Assemblée d'habitants intéressés dans la Commune de Laprairie à la réquisition du R. P. d'Heu, supérieur des Jésuites, et convention de concession d'emplacement: Adhémar, notaire royal, 30 novembre 1724"; and is in the following terms: "L'an 1724, le 30 novembre, à la sortie et issue de grande messe ledit jour dite et chantée en l'église du d. lieu de Laprairie de la Magdeleine a esté faite assemblée à la requisition du Révérend père d'Heu, Supr. des Révérends Pères de la compagnie de Jésus, Supr. de la Résidence de Ville-Marie, gérant les affaires de la Seigneurie de la Prairie de la Magdeleine, de la plus grande partie des habitants du dit lieu de Laprairie de la Magdeleine quy ont droit de commune, chez le Sr. Pinsonno, auxquels dits habitants il a esté représenté par le dit Révérend père d'Heu, qu'il est très important de travailler à l'augmentation de l'établissement du d. village du d. lieu, et ne le pouvant maintenant faire que par des concessions nouvelles d'emplacements hors le dit village qui sont unis à la commune dudit lieu, et avant ce faire ledit Révérend père d'Heu requére à cette cause et fait l'agrément et consentement des d. habitants pour ce assemblés à grand nombre, et après l'examen fait par les d. habitants que plus le d. village sera établi plus il sera en estat de soutenir et de ce deffandre à l'avenir contre les ennemis, ils ont pour cet effet à l'exception du Sr. Pierre

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

Brosso tous dit d'une commune voix qu'ils consentaient et consentent par ces présentes de leur bon gré, pleine et libre volonté que le dit Révérend Père dispose de ce jour à l'avenir luy et ces successeurs et ayant c. du terrain qui sera nécessaire de concéder pour emplacements au delà de ce quy peut estre présentement concédé autour du dit village, pour en disposer par concession d'emplacement luy ces successeurs et ayant cause de ce dit jour à l'avenir et s'en appropriéter les droits seigneuriaux. Et en reconnaissance du consentement fait par lesdits habitants au dit Révérend père d'Heu il promet de faire un présent à leur Eglise d'un tableau de St. François Xavier, de dix à onze pieds de long et de six à sept pieds de large avec un cadre doré autour d'iceluy et ce le plutôt que faire ce pourra."

The procès-verbal is signed by Father d'Heu and nine inhabitants of Laprairie, present at the meeting, and it is stated that others had declared that they did not know how to sign. There is annexed to the procès-verbal a document dated December 19, 1724, by which four other inhabitants (including Pierre Gagnier, one of the accepting parties in the deed of 1694) approve and ratify it; and also a minute of another "assemblée de la plus grande partie des habitants de la paroisse," which appears to have been held on July 25, 1725, and at which Father d'Heu, at the request of the meeting, substituted for the promised painting of St. François Xavier a payment of 600 livres for the needs of the Church.

It appears to their Lordships to be open to serious question whether this agreement was valid and binding upon the general body of the inhabitants of Laprairie. It is stated in Denisart (vol. iv., p. 729, tit. "Communauté d'habitans") that, while a small number of inhabitants present at a meeting is sufficient for the election of officers, etc., yet when it is proposed to take a step of more importance for the communauté, such as the alienation of any of its property, etc., it is necessary that the meeting should be regularly summoned by the "chefs de village," and that two-thirds of the inhabitants of the village should be present at the discussion. Merlin (vol. ii., p. 588) adds that under certain ordinances

of 1683 and 1687 no alienation can be made except for certain purposes of which the acquisition of a painting is not one; but it is not clear whether these provisions had become law in Quebec in 1724. Had there been no objection of substance to the transaction, it might perhaps after this lapse of time have been presumed that the proper forms were followed and the necessary majority obtained. But the agreement now in question purports to bestow upon the seigneurs, in consideration of the gift of a painting, the right at any time thereafter to make grants of parts of the common for building; and it would not be right to assume the validity of such an agreement, which might result in time in the complete destruction of the common rights, without strict proof that it was entered into with the proper sanction. It is true that in the years 1817 to 1820, the inhabitants of Laprairie having petitioned the Governor-General to pass legislation for the appropriation of a part of the common to building purposes, the Commissioners to whom the petition was referred, after investigating the matter, recommended that building lots should be granted by the Crown under the agreement of 1724, and this appears to have been done. But it is to be observed that the commoners were not less desirous than the Crown that grants of building lots should be made, and no inference prejudicial to their rights can be drawn from the fact that they made no objection to the manner in which effect was given to their wishes. It would appear that some other "emplacements" were granted under the agreement, but the dates and circumstances of these grants are not stated.

But even if the validity of the agreement of 1724 be assumed, there is good ground for saying that it is no longer operative. The Act of 1822 directed, as has been already stated, that the trustees, with the concurrence of the seigneur, should ascertain and fix the limits and boundaries of the common, and no reference is made to any power or authority enabling the seigneurs afterwards to encroach upon the limits so fixed. Further, by the Acts of 1854–1855 and the consolidating statute of 1861 (Lower Canada, 1861, c. 41),

J. C. 1920 LAPRAIRIE COMMON CORPORATION v. COMPAGNIE DE JÉSUS.

provision was made for the abolition of all feudal rights and duties in Lower Canada, and it was provided that no land should thereafter be granted by a seigneur to be held by any other tenure than "franc-alleu roturier," or free and common socage. It is true that the seigniories of the late Order of Jesuits and other seigniories held by the Crown were excepted from the compulsory clauses of the Act (s. 60), but provision was made for bringing those seigniories within the Act (s. 61). In view of this legislation, it is difficult to see how the respondent corporation could now make grants of emplacements under the "acte" of 1724 "et s'en appropriéter les droits seigneuriaux." Further, it seems doubtful whether the "acte" contemplates a sale of building lots at a profit, and it is clear that it would not cover a grant for brick-making purposes. The deed, therefore, if it ever had any validity, appears to be now obsolete.

For these reasons, which do not appear to have been brought to the notice of the Court of King's Bench, their Lordships are of opinion that no grant could now be made under the agreement of 1724.

Their Lordships will accordingly humbly advise His Majesty that the order appealed from should be affirmed as regards the reply to the first question and set aside as regards the replies to the second and third questions; that the second question should be left unanswered; and that the reply to the third question should be that the acte of November 30, 1724, is not in force.

Their Lordships think that, having regard to their decision, there should be no costs of this appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Witham, Roskell, Munster & Weld.*

[HOUSE OF LORDS.]

A. G. MOORE AND COMPANY . . . . APPELLANTS;
AND
DONNELLY . . . . . RESPONDENT.

H. L. (Sc.)*
1920
Dec. 17.

FIFE COAL COMPANY, LIMITED . . APPELLANTS;
AND
SHARP OR GREENWOOD OR COLVILLE AND OTHERS . . . . . RESPONDENTS.

FIFE COAL COMPANY, LIMITED . . APPELLANTS;
AND
FYFE OR GORDON AND ANOTHER . . . RESPONDENTS.

Workmen's Compensation—Arising out of and in the Course of Employment—Breach of Mining Regulations—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 61, 86; *Explosives in Coal Mines Order of September* 1, 1913, *para.* 3 (*a*); *General Regulations of July* 10, 1913, *paras.* 4, 9—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1 *and* 2 (*c*).

In considering the right to compensation under the Workmen's Compensation Act, 1906, the question whether a prohibition limits the sphere of employment or deals only with conduct within the sphere of employment is not determined by the mere fact that the prohibition is statutory.

A miner in the course of his employment fired a shot by means of a fuse and detonator and retired to a place of safety. The shot missed fire. In contravention of para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, made under s. 61 of the Coal Mines Act, 1911, he returned to the place of the shot in less than one hour, when the shot blew off in his face and permanently disabled him.

A miner who was working in a certain level with another was sent by his colleague to get brattice nails. He went to a disused part of the mine, which was fenced off by a railing containing the words "No Road," and was killed by poison gas. Brattice nails were procurable in an easily accessible part of the mine. The General Regulations of July 10, 1913, made under s. 86 of the Coal Mines Act, 1911, provided, by clause 4 (subject to certain qualifications and exceptions which did not apply), that no workman should go into any part of the mine other than that part in which he worked, and, by clause 9, that no person should without authority pass beyond any fence or danger signal:—

Held, in each case, that the contravention of these mining regulations

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (Sc.)
1920
A. G. Moore & Co. v. Donnelly.
Fife Coal Co. v. Sharp.
Same Co. v. Fyfe.

took the miner outside the sphere of his employment, and that consequently the injury did not arise out of and in the course of his employment.

Conway v. *Pumpherston Oil Co.* 1911 S. C. 660 overruled.

Decision of the First Division of the Court of Session in Scotland reversed in each case.

A. G. MOORE AND COMPANY *v.* DONNELLY.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland affirming a determination of the Sheriff-Substitute of the Lothians and Peebles upon a stated case under the Workmen's Compensation Act, 1906.

The facts are fully stated in the opinion of the Lord Chancellor.

The accident arose out of a breach of para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, which provides that if a shot misses fire the person firing the shot shall not approach the shot-hole, in the case of a shot fired by a fuse and detonator, until an interval has elapsed of not less than an hour.

The Sheriff made an award in favour of the workman, the respondent, and the question of law submitted to the Court was whether on the facts he was entitled to find that the accident to the respondent arose out of and in the course of his employment with the appellants.

The First Division (the Lord President (Lord Strathclyde), Lord Mackenzie, Lord Skerrington, and Lord Cullen) on the authority of *Conway* v. *Pumpherston Oil Co.* (1) answered this question in the affirmative.

1920. Dec. 2. *Condie Sandeman K.C.* (of the Scottish Bar) and *Harold W. Beveridge* for the appellants. This case is covered by *Bourton* v. *Beauchamp* (2) as was recognized by the Court of Appeal in *Whiddart* v. *Chislet Colliery Co.* (3), where they refused to follow the decision of the First Division in the present case upon the ground that it was inconsistent with *Bourton* v. *Beauchamp*. (2) At the time of the decision of the First Division *Bourton* v. *Beauchamp* (2)

(1) 1911 S. C. 660.
(2) [1920] A. C. 1001; (1919) 12 B. W. C. C. 118.
(3) (1920) 13 B. W. C. C. 157.

had not been decided by this House and the Court considered that they were bound by *Conway* v. *Pumpherston Oil Co.* (1), although they recognized that it could not be reconciled with the decision of the Court of Appeal in *Bourton's Case* (2), and the President would have followed the decision of the Court of Appeal if he had been free to do so. Lord Wrenbury, when Buckley L.J., in his dissentient judgment in *Harding* v. *Brynddu Colliery Co.* (3), commented adversely on *Conway's Case* (1), which must be treated as impliedly overruled by this House in *Bourton's Case.* (2) Here the respondent at the time of the accident was acting in direct contravention of a statutory regulation designed for the general safety of miners and was in a position in which he should not have been. The injury therefore did not arise out of his employment.

Alex. Moncrieff K.C. (with him *W. H. Stevenson*) (both of the Scottish Bar) for the respondent. It might appear from certain dicta in *Bourton's Case* (2) that where the misconduct is the contravention of a statute that is a necessary bar to the workman's claim to compensation. But on the question whether the prohibition goes to the sphere of the employment the fact that the prohibition is statutory is irrelevant. The prohibition, even when it has the force of a statute behind it, must be construed with reference to what it prohibits: *Plumb* v. *Cobden Flour Mills Co.* (4) Then, if the statutory element is not conclusive of the answer to the question into which of the two classes laid down in *Plumb's Case* (4) the prohibition falls, the cases on non-statutory prohibitions apply, and the question comes to be what is the outlook, as regards limiting the employment, of the prohibition, whether statutory or not. *Bourton's Case* (2) is distinguishable from the present by reason of the difference in the injunction which was violated. Here the respondent had a general mandate to act as a shotfirer, and if at the time of the accident he was within his general mandate he is not deprived of compensation because in doing the work which he was

(1) 1911 S. C. 660.
(2) [1920] A. C. 1001.
(3) [1911] 2 K. B. 747, 754.
(4) [1914] A. C. 62.

H. L. (Sc.) 1920 A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe.

employed to do he transgresses a statutory prohibition. That is the foundation of the decisions in *Conway's Case* (1) and in *Harding's Case.* (2) Lord Wrenbury, in dissenting in the latter case, was dissenting not as to the law but as to the facts. In the course of his employment the respondent fired a shot, and in the course of his employment he returned to the place where the shot was fired, but in that return he transgressed a statutory prohibition. He went to a place to which, apart from the question of time, he had a right to go for a purpose which was within the sphere of his employment. To go to the place was an employment act, but to go to the place at a particular time was an employment manner. The prohibition which has been transgressed is a prohibition as to the manner of doing the work, and not a prohibition restricting the scope of the employment. The two cases of *M'Diarmid* v. *Ogilvy* (3) and *Mawdsley* v. *West Leigh Colliery Co.* (4) aptly illustrate this distinction. This case falls precisely within the latter case.

In *Bourton's Case* (5) the statutory regulation which was broken was in a double form—negative and positive. There was first the negative provision, that if a shot missed fire no shot should be fired in the same hole ; and there was then the positive provision, that another shot should be fired in a fresh hole a certain distance away. That was a positive direction as to what the shotfirer was to do when he came within the danger zone. He was not to use the old hole but was to bore a new one. What the man did was not within that positive authority, and he was refused compensation, not because he broke a prohibition, but because he failed to prove that he had authority to do what he did. The positive injunction limited the mandate of the employee, and *Bourton's Case* is distinguishable on that ground.

He also referred to *Barnes* v. *Nunnery Colliery Co.* (6)

The House took time for consideration.

(1) 1911 S. C. 660.
(2) [1911] 2 K. B. 747.
(3) 1913 S. C. 1103.
(4) (1911) 5 B. W. C. C. 80.
(5) [1920] A. C. 1001.
(6) [1912] A. C. 44, 47.

FIFE COAL COMPANY, LIMITED *v.* SHARP OR GREENWOOD OR COLVILLE AND OTHERS.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland affirming a determination of the Sheriff-Substitute of Fife and Kinross upon a stated case under the Workmen's Compensation Act, 1906.

The facts of this case were indistinguishable from those of the previous case, except that the accident proved fatal and the claim was made by the deceased man's dependants. They are fully stated in the opinion of the Lord Chancellor.

The Sheriff-Substitute awarded compensation, and the question of law submitted to the Court was whether there was evidence upon which he was entitled to find that the death of the workman (John Colville) resulted from personal injury by accident arising out of and in the course of his employment with the Fife Coal Co.

The First Division (constituted as before) answered this question in the affirmative.

1920. Dec. 2. *Condie Sandeman K.C.* and *R. J. Wallace* (both of the Scottish Bar) for the appellants.

Alex. Moncrieff K.C. and *David R. Scott* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

FIFE COAL COMPANY, LIMITED *v.* FYFE OR GORDON AND ANOTHER.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland recalling a determination of the Sheriff-Substitute of Fife and Kinross upon a stated case under the Workmen's Compensation Act, 1906.

In this case a miner named Alexander Gordon died from gas poisoning as the result of entering a fenced-off portion of the mine in which he was working, and his dependants claimed compensation.

In going beyond the fence he was transgressing paras. 4 and 9 of the General Regulations of July 10, 1913, made

H. L. (Sc.)
1920
A. G. Moore & Co. v. Donnelly.
Fife Coal Co. v. Sharp.
Same Co. v. Fyfe.

under s. 86 of the Coal Mines Act, 1911. Para. 4 provided that no workman should, except so far as might be necessary for the purpose of getting to or from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he worked.

Para. 9 provided that no person should without authority pass beyond any fence or danger signal.

The facts are fully stated in the opinion of the Lord Chancellor.

The Sheriff-Substitute found that the employers were not liable to pay compensation and stated the following question for the opinion of the Court: Was there evidence upon which he was entitled to find that the death of Alexander Gordon did not result from personal injury by accident arising out of and in course of his employment?

The First Division (Lord President Clyde, Lord Mackenzie, Lord Skerrington, and Lord Cullen) answered this question in the negative and remitted the case to the Sheriff-Substitute.

1920. Dec. 2. *Condie Sandeman K.C.* (of the Scottish Bar) (with him *Harold W. Beveridge*) for the appellants. This case, like the preceding cases, is governed by *Bourton* v. *Beauchamp*. (1)

Alex. Moncrieff K.C. (with him *David R. Scott*) (both of the Scottish Bar) for the respondents. Upon the footing that there has been a breach of the regulations, these regulations relate not to the public safety but to the internal management of the mine. They are mere regulations of the conditions of the employment, and there is here no question of added risk. *Bourton* v. *Beauchamp* (1) therefore does not apply.

The House took time for consideration.

Dec. 17, 1920. Lord Birkenhead L.C. My Lords, it will, I think, be convenient if I read in succession the speeches I have prepared in these three cases, afterwards of course putting the

(1) [1920] A. C. 1001.

questions individually from the Woolsack. The first is *Moore's Case.*

My Lords, the facts in this appeal are as follows: On March 26, 1919, while the respondent was at work as a coal miner in the appellants' employment in Dalkeith Colliery, Dalkeith, he suffered personal injury by accident. The accident happened in the following manner. Two shots close together were being prepared and fired by means of detonators with fuses attached, one being prepared and fired by the respondent and another by a miner named Bell. When the fuses were lighted the respondent and Bell retired to a place of safety. Only one shot went off and the respondent returned within ten minutes to the place of the other shot and while there it blew off into his face. For the person firing a shot by means of a fuse to approach or allow any one to approach the shot-hole within one hour of firing the shot, if it has missed fire, is an offence within s. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, the exact terms of which I have cited in my judgment in the case of the *Fife Coal Co.* v. *Sharp.* In my opinion this case cannot be distinguished from that decision and the appeal must be allowed.

My Lords, the case of the *Fife Coal Co., Ld.* v. *Sharp or Greenwood or Colville and Others* is an appeal from a judgment of the First Division of the Court of Session, Scotland, pronounced upon an appeal at the instance of the present appellants by way of a stated case under the provisions of the Workmen's Compensation Act, 1906.

The facts are very short: One John Colville was on September 2, 1919, employed as a stone-miner by the appellants in their No. 1 pit, Lumphinnans. He was on that date in the company of one Thomas Canavan, driving a road through sandstone in this pit. They were directed to bore two shot-holes in the sandstone face of their working place, and to charge and fire the shots. Each of the two men then took the ordinary steps to fire his shot. Canavan saw that his strum had caught fire and said to Colville that it was

H. L. (Sc.) 1920 A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe. Lord Birkenhead L.C.

lit. Colville said that he had failed to light his strum. To avoid the explosion of Canavan's shot, the two men left their working place. Before they had gone thirty yards Canavan's shot went off. They waited ten minutes and then returned. While they were looking for Colville's strum his shot exploded and he was killed.

Operations at the pit in question are governed by the Coal Mines Act, 1911. A copy of the material sections of this Act and of The Explosives in Coal Mines Order of September 1, 1913, were posted at the pithead. Sect. 3 (*a*) of that order is as follows: "If a shot misses fire the person firing the shot shall not approach or allow any one to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity, or by a squib, and not less than an hour in the case of shots fired by other means."

The following notice was also conspicuously posted at the pithead: "Workmen's Compensation Act, 1906. Notice. The attention of all workers in this colliery is called to Section 3 (*a*) of the Explosives in Coal Mines Order of 1st September, 1913, made by the Home Secretary, which provides that if a shot misses fire no person shall approach the shot-hole until an interval has elapsed of not less than 10 minutes in the case of shots fired by electricity, and not less than an hour in the case of shots fired by other means, and it is hereby directed that the above-mentioned provisions shall apply to all cases where an attempt has been made to light a shot and the men have retired, and no person shall in such circumstances, on any pretext, return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot. The management will, where allowable, found on any breach of the provisions of the section above quoted and of this notice, as 'serious and wilful misconduct' on the part of the workman, or as being outwith his employment, in the event of an accident resulting therefrom."

The arbitrator found that the respondents, the present appellants, were liable to pay compensation to the dependants of Colville, and proposed for the opinion of the Court the

following question: "Was there evidence on which I was entitled to find that the death of John Colville resulted from personal injury by accident arising out of and in the course of his employment with the respondents, The Fife Coal Company, Limited?"

The First Division found themselves in agreement with the arbitrator. The Lord President, however, reached this conclusion reluctantly, holding the case indistinguishable from *Bourton's Case* (1) but yielded to the authority, binding upon him, of *Conway's Case*. (2)

Since the hearing in the First Division *Bourton's Case* (1) has been before your Lordships, and the question which requires an answer in the present appeal is whether the facts are distinguishable from those in *Bourton*. I have reached the clear conclusion that they are not. In *Bourton's Case* (1) the miner was employed to get coal by pick or shot firing. When he arrived at the coal face he saw a hole already drilled, and stopped with stemming, and also the charred remains of a fuse. Intending to lay a fresh shot in the same hole he proceeded to remove the stemming. An explosion resulted causing his death. It was made plain in the course of the hearing that the hole had been charged two days before, but that the shot had missed fire. The use of explosives at the mine was regulated by statutory regulations made under the Coal Mines Act, 1911, which provided that when a hole had been charged no part of the stemming should be removed, and that if a shot misfired a second charge should not be placed in the same hole. Your Lordships were of opinion that the deceased in disobeying the statutory regulations was acting outside the sphere of his employment, and that consequently his death was not caused by accident arising out of and in the course of his employment.

In the course of his opinion Viscount Cave quoted a passage from the judgment of Lord Sumner in *Highley's Case* (3) which contained an admirable summary of the law. Inasmuch as the passage referred to completely represents my own

(1) 12 B. W. C. C. 118; since affirmed [1920] A. C. 1001.
(2) 1911 S. C. 660.
(3) [1917] A. C. 352, 372.

H. L. (Sc.) 1920

A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe.

Lord Birkenhead L.C.

view, it may be repeated here: "I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

The attempts made by counsel in the course of the debate to distinguish *Bourton's Case* (1) from the present, though ingenious, were unsubstantial and far fetched. It was no part of Colville's employment to hazard, to suffer, or to do that which caused his injury. The cause of his accident was not within the sphere of his employment, it was not one of its ordinary risks, nor was it reasonably incidental thereto. The deceased was not, in the language of Viscount Cave, "doing a permitted act carelessly; he was doing an act which he was prohibited from doing by statutory provisions which attach to his employment, and which by those provisions was expressly excluded from his employment."

The conclusion which I have reached makes it proper for me to point out that the decision in *Conway's Case* (2) can no longer be accepted. My noble friend Lord Dunedin, in the course of his judgment in that case, made a permanent

(1) [1920] A. C. 1001.

contribution to the accepted legal doctrines upon this subject. I should feel more difficulty in overruling this judgment if it did not appear to be plain that he himself had in *Plumb's Case* (1) reached a similar conclusion.

I have purposely abstained from laying particular stress upon the circumstance that the rule violated by the deceased workman in the present case was of statutory origin, because, on principle, no distinction can logically be drawn between a prohibition founded upon statute and one imposed by the employer to regulate the employment. It is no doubt true that a statutory prohibition will usually be more notorious and more authoritative. Nor can it be made the subject of waiver or of informal modification. But where a prohibition for which the employer is responsible, in matters comparable to those under discussion, is brought clearly to the notice of the workman, his breach of it takes him outside the sphere of his employment, so that the risk in which he involves himself has ceased to be reasonably incidental to that employment.

For these reasons I am of opinion that the interlocutor must be recalled, and I move your Lordships accordingly.

My Lords, in the third appeal—*Fife Coal Co., Ld.* v. *Fyfe or Gordon and Another*—I have formed the same opinion. The facts, which are in some respects different, but which raise similar points in law to those debated in the earlier cases, were as follows:—

The respondents are the dependants of one Alexander Gordon, who, on August 28, 1919, was in the employment of the appellants in No. 2 pit at Valleyfield Colliery. He was working with another miner named Joseph Gordon in a heading off a level called in the case Gordon's Level. A short distance away two other miners, Lessels and Munro, were working in a level called Lessels's Level. Both levels were driven off No. 5 Heading of the East Five-feet Jig Brae Section. Lessels's Level was immediately above Gordon's Level, both levels being on the side of No. 5 Heading, on which was

(1) [1914] A. C. 62.

H. L. (Sc.) 1920 A. G. MOORE & Co. v. DONNELLY. FIFE COAL Co. v. SHARP. SAME Co. v. FYFE. Lord Birkenhead L.C.

the intake of the air-course. The gradient was about one in three or one in four. There was a double line of rails in this heading and brattice cloth was fixed between the two lines so as to direct the ventilation up one line and down the other. Brattice cloth was also led from the centre of the heading along both levels in order to divert the air current on the intake side of the heading into these levels. Above Lessels's Level the whole of No. 5 Heading was fenced off, and had been so fenced off for some weeks when work there had been stopped.

About 10.30 A.M. on the day in question, Joseph Gordon required some brattice nails for his work and told the deceased, who was acting as his drawer, to get some. The deceased met Lessels just outside Gordon's Level and was told by him that there were some brattice nails in the manhole below Lessels's level. Deceased then went into Lessels's Level, where he saw Munro, who was at work. Munro told him that he had no such nails. Deceased then went out of Lessels's Level into the heading by the way he had come, that is, on the intake side, and got through a flap in the brattice cloth on to the return air-course side. About a quarter of an hour after deceased had started on his errand, Joseph Gordon went to look for him, and found him in an unconscious condition in No. 5 Heading on the intake side about thirty yards above Lessels's Level and some seven or eight yards from the top of the heading. Some distance below the brattice cloth was found to be torn at the bottom. The deceased died shortly afterwards from gas poisoning. There had been on that morning an outburst of gas on the intake side of the heading above the fencing which cut off the top of the heading at Lessels's Level, and the spot where deceased was found was thirty feet inside the gas.

Brattice nails were kept in a box at the head of Jig Brae. The deceased knew this and had previously taken nails from this box. He also knew that such nails could be obtained from a roadsman or a fireman, as they always carried nails, and the deceased had obtained nails from a roadsman. The way to the top of the Jig Brae along which deceased was

entitled to pass on his way to the box was a level road, and drawers were constantly going out and in on this road, and as it was one of the duties of these drawers to bring in nails to men working in this section of the mine, if asked to do so, he could have asked any of them to bring the nails to him. The place where he was found was not a part of the mine in which he was working, nor was it the proper road by which he travelled to or from his work.

The General Regulations, dated July 10, 1913, made under s. 86 of the Coal Mines Act, 1911, apply to No. 2 Pit of Valleyfield Colliery, and were duly posted at the pithead. The relevant regulations are as follows :—

"(4.) Subject to any directions that may be given by any official of the mine, no workman shall, except so far as may be necessary for the purpose of getting to and from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works, or travel to or from his work by any road other than the proper travelling road."

"(9.) No person shall, without authority, pass beyond any fence or danger signal or open any locked door."

Whatever may have been the reason which led the workman to go beyond Lessels's Level up the heading, it is clear that there was no reason or need why he should have done so for any purpose connected with his work or the errand upon which he was engaged, and in so doing he committed a breach of the two regulations which I have read. It was not the place to which he should have gone to look for nails, and he was not entitled to go there. It cannot be said, therefore, that the poisoning which caused his death arose either out of or in the course of his employment. Here again the matter is concluded by the decisions in *Bourton's Case* (1) and *Sharp's Case*.

VISCOUNT FINLAY. My Lords, the material facts in the case of *A. G. Moore and Company* v. *Donnelly* were as stated

(1) [1920] A. C. 1001.

H. L. (Sc.) 1920 A. G. MOORE & CO. v. DONNELLY. FIFE COAL CO. v. SHARP. SAME CO. v. FYFE. Viscount Finlay.

by the Lord President at the commencement of his judgment: "The Respondent was a coal miner. His duty was to fire a shot. He lit the fuse and retired to a place of safety. The shot missed fire. In direct contravention of paragraph 3 (*a*) of the Explosives Coal Mines Order of 1st September, 1913, the Respondent returned to the place of the shot in question in less than one hour, when the shot blew off in his face and permanently disabled him."

The question is whether the workman at the time of the accident was acting within or outside the sphere of his employment. The arbiter held that he was acting within the sphere of his employment. In the Court of Session he was affirmed on the authority of *Conway's Case* (1), but the Lord President gave at some length his reasons for thinking that apart from the authority of that case the decision should have been the other way.

This decision was given on April 1, 1920. Next month, on May 17, the case of *Bourton* v. *Beauchamp* (2) was heard in your Lordships' House. The facts of the present case are indistinguishable from those of *Bourton* v. *Beauchamp*. It was there held that the workman was acting outside the sphere of his employment and that consequently his death was not caused by accident arising out of and in the course of his employment. That decision governs the present case.

I desire only to add that the decision that the workman was acting without the sphere of his employment does not depend upon the fact that the regulation which he was infringing was statutory. The same result would follow if the terms of his employment were to the same effect as the statutory regulation. The question is simply whether what the man was doing fell within the sphere of his employment, and is the same whether that sphere be defined by statute or by the contract of employment.

My Lords, in the *Fife Coal Co.'s Case* v. *Sharp* and in the *Fife Coal Co.'s Case* v. *Fyfe* I am of opinion that the same principle governs these two cases, and I agree with the conclusion arrived at in them by the Lord Chancellor.

(1) 1911 S. C. 660. (2) [1920] A. C. 1001.

Lord Dunedin. My Lords, in the case of *A. G. Mooreand Co.* v. *Donnelly*, I concur in the judgment of the Lord Chancellor. I should not have added anything were it not for the fact that a good many judgments in which I took part have been quoted along with a certain number of dicta of my own.

On the general question I have nothing really to add to what I said in *Plumb's Case* (1), with the approval of the noble and learned Lords who sat along with me.

I think the statement of the classes of prohibition as explained in that case is an exhaustive statement. I think that the question of deciding within which class any prohibition falls is not determined by the mere fact that the prohibition is statutory: in other words, the difference between a statutory and a non-statutory prohibition does not consist in that in the former case there is only one class while in the latter there are two. The difference lies in two points, the first that from the evidential point of view a man cannot be heard to say he does not know what a statute enjoins, and the second that while a statutory prohibition cannot, a non-statutory may be waived. The remarks of Lords Atkinson and Shaw in *Fox's Case* (2), to which I asserted my adhesion in *Bourton's Case* (3), do not really affect the ground of the argument, but are merely a very cogent reason why there should be no judgment-made relaxation of the rules which exist.

The sole question, therefore, comes to be: Within which class does this prohibition fall? It clearly falls within the first, i.e.—of prohibitions limiting the sphere—unless this case can be distinguished on the facts from *Bourton's Case.* (3) Now, the only distinction which Mr. Moncrieff in his admirable argument could make was that in *Bourton's Case* (3) the rule or regulation consisted of two parts; first, a prohibition in the negative form—"Thou shalt not"; and, secondly, an instruction in positive form—"Thou shalt," whereas in the present case the rule was only in the negative form. From that he argued that in *Bourton's Case* (3) the real want of

(1) [1914] A. C. 62. (2) [1916] 1 A. C. 405.
(3) [1920] A. C. 1001.

H. L. (Sc.) 1920 A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe. Lord Dunedin.

authority for the man to do what he did came not from his contemning the negative prohibition, a contempt which in itself was only disobedience, but in the absence of any positive authority to do what he did, his only positive authority being to do something which he did not do. In the present case he says the man had a general positive authority to deal as a shot-firer with the portion of the face to be exploded. My Lords, this is very ingenious, but it is, in my judgment, quite fallacious. In both cases there is a prohibition to do certain things within a certain time from a certain occurrence. Whether when that time has elapsed what he may do depends upon special or upon general and implied instructions matters not. In each case if he acts within the prohibited time he is going out of the sphere of his employment, for he is doing what he was not employed to do.

I must only add that after renewed consideration of the case of *Conway* (1) I am satisfied that the decision to which we came was wrong, and that Lord Wrenbury's criticism delivered in *Harding's Case* (2) on my judgment was well founded. Nor will I attempt to shield myself under the plea that the point that the prohibition was a statutory one seems from the report both of the argument and the judgment not to have been before the Court. What I have just said prevents that fact being any excuse. I can only say that armed with a greater authority than I had in *Conway's Case* (1) I came to deliver judgment in your Lordships' House in *Plumb* (3) adopting, no doubt, the general principle laid down in *Conway* (1), but logically, I think, overruling the results arrived at on the facts. That was followed in *Bourton's Case* (4), and between that case and this there is no relevant distinction. In the other two cases I concur with the Lord Chancellor.

Lord Atkinson. My Lords, I concur with the judgment of the Lord Chancellor. The facts have been already fully stated. I think the case of *Moore* v. *Donnelly* completely

(1) 1911 S. C. 660.
(2) [1911] 2 K. B. 747, 752.
(3) [1914] A. C. 62.
(4) [1920] A. C. 1001.

covered by the decision of this House in *Bourton* v. *Beauchamp*. (1) In neither case was the workman merely prohibited from doing carelessly or recklessly an act he was employed and entitled to do. The statutory prohibition in each case, which because it was statutory the workman must be taken to have known, and which the employer could not waive, extended beyond that. It forbade the doing in any manner whatever of certain things—namely, the being in a certain place within a certain time after the occurrence of a certain event. An act may, of course, in the case of a workman, be as effectually prohibited by his contract of service as by a statute, and in neither case is it necessary to couch the prohibition in any particular form of words. All that is, in my view, necessary is that the workman should be clearly informed that he is not to do the particular act, as distinct from the manner of doing it. If he be, in effect, so informed, then it has always appeared to me that it is impossible to hold that the prohibited act is within the scope of the workman's employment. To do so would amount to deciding that a workman might be employed to do and, at the same time, to abstain from doing a particular thing. The appeal should therefore, in my opinion, be allowed with costs here and below.

The same authority rules I think the other two cases mentioned. I have already pointed out in *Bourton* v. *Beauchamp* (1) that the provisions as to serious and wilful misconduct only apply to a case where the workman is doing an act within the scope of his employ. He may then, if he does not lose his life, be by reason of that misconduct deprived of the compensation he might otherwise have been entitled to.

LORD SHAW OF DUNFERMLINE. My Lords, in the first of these cases, that of *Moore*, the workman, a miner, sustained very serious injuries by an accident occurring on March 26, 1909, in one of his employers' pits.

By para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, it is provided that: "If a shot miss fire,

(1) [1920] A. C. 1001.

H. L. (Sc.) 1920 A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe. Lord Shaw of Dunfermline.

the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

The mode of firing was neither in the present instance by electricity nor by a squib, and therefore, when a shot failed to explode, the workman was plainly prohibited from returning to the place of the shot within one hour.

He, however, returned within less than ten minutes, when, the shot exploding, he was injured.

It is plain that in so returning he was thereby contravening the statutory order; and by s. 101, sub-s. 3, of the Coal Mines Act of 1911, he was thus guilty of an offence for which he was liable to be fined; or, in circumstances of danger to others than himself, was liable to be imprisoned for three months.

My Lords, the sole question in the case is whether when the workman met with his accident he was within the scope of his employment. Once it is settled that he was not, then any question as to whether his conduct amounted to serious and wilful misconduct is not in place. That latter question does not arise until the former question has been settled in the affirmative.

In the present case I am of opinion that it was outside the scope of the workman's employment to be at the time of the accident at the place where he was. It was his duty not to be in that place but to be elsewhere. This being so, then, so far as the law is concerned, your Lordships in this House, as it humbly appears to me, are clearly bound by the decision in the case of *Bourton*. (1) A further citation of authority is substantially unnecessary, because the decision in *Conway's Case* (2) in the Court of Session cannot be reconciled with *Bourton* in this House. In reference to *Conway's Case* (2) I desire, however, to say that apart from the application to the particular facts of that case which must now be held to have been erroneous, I know no more satisfactory

(1) [1920] A. C. 1001. (2) 1911 S. C. 660.

statement of the general law as to the ambit of employment than what was there laid down by my noble and learned friend Lord Dunedin. With those passages and with his judgment in the case of *Plumb* (1) the guiding authority is provided in this branch of the law.

At the time of the decision in this case your Lordships had not decided that of *Bourton*, and the learned judges of the Court of Session stood bound by *Conway's* decision. The Lord President, in these circumstances, puts the difficulty thus: "I am unable," he says, "to see how a workman who has brought a disaster upon himself by wilfully disobeying a statutory prohibition, limiting, as I think, the sphere of his employment, can be said to be acting within the scope of his employment." I fully agree with the learned Lord President, and in *Bourton's Case* (2) that was the view of this House. The difficulty is removed.

My Lords, I only desire to add one word lest any misapprehension should arise to the effect that the principle of *Bourton* is necessarily confined to the case of statutory employment. Upon the question of prohibition specially made by Act of Parliament for the protection of those engaged in dangerous employment, I have nothing to add to what I said in *Herbert* v. *Fox & Co.* (3) In the case of what may be called statutory employment the Act and the rules thereunder make clear beyond all question what are the definite lines of the employment. When these lines are transgressed, with the natural consequences of danger to all concerned—danger to life and limb, and property, and with the possible criminal consequence to the chief actor—then there can be no question arising as to the act being beyond the scope of the employment. Whereas, in the case of private employment there may be difficulties of establishing the ambit of particular rules, their application to specific circumstances, the possible point whether they were waived at a particular time or in the case of a particular man, and the further possible point as to whether this waiver was express or was to be implied through conduct and slackness of management.

(1) [1914] A. C. 62. (2) [1920] A. C. 1001. (3) [1916] 1 A. C. 405.

H. L. (Sc.) 1920 A. G. Moore & Co. v. Donnelly. Fife Coal Co. v. Sharp. Same Co. v. Fyfe. Lord Shaw of Dunfermline.

In the case of statutory rules, these questions do not arise. It is not possible to abrogate them except by a statutory repeal or an administrative regulation which has statutory force, and all parties, whether employer or workman, who were art and part in such a contravention, stand liable to the penal consequences prescribed. It is in this way that the breach of the statutory regulation, so far as the law is concerned, has made clear and vivid the limits and scope of the employment. The statute stands probatio probata upon that topic. In a case of ordinary employment, once the limits of the range of employment are made clear, then, of course, similar consequences, that is to say the application of a similar principle, would follow.

I agree to the course proposed from the Woolsack.

In *Sharp or Greenwood or Colville's Case* the result and reasoning leading up to the decision come to in *Moore* has expressly negatived the right to recovery of compensation. The facts are unfortunately much the same. The imperative prohibition of the statute was again disobeyed.

In *Fyfe or Gordon's Case* I think the same principle holds. By a general regulation dated July 10, 1913, issued by the Secretary of State under s. 86 of the Coal Mines Act, 1911, it was provided that :—

"(4.) Subject to any direction that may be given by any official of the mine, no workman shall, except so far as may be necessary for the purpose of getting to and from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works, or travel to or from his work by any road other than the proper travelling road."

"(9.) No person shall without authority pass beyond any fence or danger signal or open any locked door."

Alexander Gordon, a miner in the pit, left the place of his work in search of brattice nails which were kept in a box at the head of a part of the pit known as the Jig Brae. Most unfortunately, however, instead of going there for the nails or asking a drawer to bring the nails to him, he entered another

and fenced-off part of the pit; and there he met his death by gas poisoning. There is no question in the case as to the fencing-off with the notice, "No Road"; and no question as to the application of the rule to the circumstances.

The learned Sheriff-Substitute, who had a clear apprehension, as is shown by his careful note, of the Case Law upon this topic, says that "the workman went to a place where he was not employed to work; he went there contrary to expressed orders and contrary to regulations which have the force of Statute; his action in going there was a criminal offence for which he was liable to penalty; his breach of the regulation resulted in his death." And he closed his review by saying: "It is sufficient to say that in going into the fenced-off portion of No. 5 head he went out of the course of his employment, and that any personal injury or accident which he sustained in that place did not arise out of the employment."

I concur with this clear statement. It is a lamentable case; but apparently those most salutary lessons of discipline read by the Legislature on this subject are still unhappily and not infrequently disregarded. All that we can do is to uphold the law applicable to such a situation.

I agree.

A. G. MOORE AND COMPANY *v.* DONNELLY.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and cause remitted back to the Court of Session in Scotland with a direction to answer the question of law in the negative. The respondent to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, Dec. 17, 1920.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agent for the respondent: *P. F. Walker, for Gray, Muirhead and Carmichael, S.S.C., Edinburgh and Dalkeith.*

H. L. (Sc.) 1920

A. G. Moore & Co. v. Donnelly.
Fife Coal Co. v. Sharp.
Same Co. v. Fyfe.

FIFE COAL COMPANY, LIMITED *v.* SHARP OR GREENWOOD OR COLVILLE AND OTHERS.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and cause remitted back to the Court of Session in Scotland with a direction to answer the question of law in the negative. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, Dec. 17, 1920.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and Wallace & Begg, W.S., Edinburgh.*

Agent for the respondents: *P. F. Walker, for Macbeth, Currie & Co., Solicitors, Dunfermline, and Alex. Macbeth & Co., S.S.C., Edinburgh.*

FIFE COAL COMPANY, LIMITED *v.* FYFE OR GORDON AND ANOTHER.

Interlocutor of the First Division of the Court of Session in Scotland reversed, and cause remitted back to the Court of Session in Scotland with a direction to answer the question of law in the affirmative and to restore the determination of the Sheriff-Substitute and remit to him to proceed as accords. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, Dec. 17, 1920.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agent for the respondents: *P. F. Walker, for Macbeth, Currie & Co., Dunfermline, and Alex. Macbeth & Co., S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

ARCHIBALD RUSSELL, LIMITED . . APPELLANTS;

AND

CORSER . . . . . RESPONDENT.

H. L. (Sc.)*
1920
Dec. 17.

Workmen's Compensation—Industrial Disease—Removal of diseased Organ—Certificate of Disablement—Validity—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1.

A workman, by reason of the nature of his work, contracted a disease in his right eye, which had to be removed. After the removal of the eye he obtained a certificate of disablement from a certifying surgeon, who certified that, having personally examined the workman, he was satisfied that "he is suffering from" an industrial disease—namely, ulceration of the corneal surface of the eye due to tar, pitch, etc.—and further certified, under the heading "Symptoms of Disease": "He has lost his right eye as the result of corneal ulceration":—

Held, that the words of s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, "suffering from a disease mentioned in the Third Schedule to this Act" (i.e., an industrial disease) ought to be construed as including the case of a workman suffering from the results of a surgical operation rendered necessary by the disease, and that the certificate complied with the requirements of the Act.

Mapp v. *Straker* (1914) 7 B. W. C. C. 18 disapproved by Lord Shaw of Dunfermline.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland upon a stated case under the Workmen's Compensation Act, 1906, recalling a determination of the Sheriff-Substitute of Stirling, Dumbarton, and Clackmannan.

The appeal arose out of an application by the respondent for compensation in respect of an industrial disease. The respondent was employed in breaking up blocks of pitch for the manufacture of briquettes, and by reason of his employment his right eye became affected and had to be removed.

The question for determination was whether a certificate of disablement obtained after the removal of the eye from a certifying surgeon, who certified that, having personally

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (Sc.) 1920 ARCHIBALD RUSSELL v. CORSER.

examined the respondent, he was satisfied that he was suffering from an industrial disease—namely, ulceration of the corneal surface of the eye due to pitch—and who certified further, under the heading "Symptoms of Disease," that the respondent had lost his eye as the result of corneal ulceration, was a valid certificate of disablement within the meaning of s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906.

This certificate was subsequently affirmed by a medical referee.

The facts are fully stated in the opinion of the Lord Chancellor.

The Sheriff-Substitute pronounced against the validity of the certificate and submitted the following questions to the Court :—

1. Was he justified in finding that the certificate was not a certificate of disablement as required by s. 8, sub-s. 1, of the Statute ?

2. If the first question was answered in the affirmative, was he justified in finding that the decision of the medical referee did not make the certificate effective ?

The First Division (Lord President Clyde, Lord Mackenzie and Lord Skerrington ; Lord Cullen dissenting) answered the first question in the negative, and held that the second question was superseded.

1920. Dec. 6. *Condie Sandeman K.C.* (of the Scottish Bar) and *Harold W. Beveridge* for the appellants. A certificate which certifies that a workman is suffering from a disease of an eye which has been removed is self-contradictory and is not a valid certificate of disablement as required by s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906 : *Mapp* v. *Straker*. (1) The sub-section must be literally construed, otherwise hardship would arise to the employer. It was the duty of the workman to obtain a certificate during the interval which elapsed between the cessation of work and the operation. If that had been done the employer's medical advisers could have examined him. It may be that different considerations

(1) 7 B. W. C. C. 18, 23.

would arise in a case of emergency, but there was no question of emergency in this case. Assuming that the certificate was invalid, the affirmance of the certificate by the medical referee could not cure the defect.

F. A. Macquisten K.C. (of the Scottish Bar) and *Scanlan* for the respondent were not called on.

The House took time for consideration.

1920. Dec. 17. LORD BIRKENHEAD L.C. My Lords, this is an appeal under the Workmen's Compensation Act, 1906, by Archibald Russell, Ld., against the judgment of the First Division of the Court of Session in Scotland pronounced upon a stated case in an arbitration between the respondent and the appellants, in the course of which a stated case was prepared by the arbitrator upon the requisition of the respondent.

The facts are extremely simple and may be shortly stated:—

James Corser, a labourer, 41 years old, was on April 21, 1919, employed by the appellants in breaking up blocks of pitch for the manufacture of briquettes. On that day, alarmed by eye trouble, he left his work. He went as an inmate to the Glasgow Eye Infirmary; remained there for five weeks, and on June 9, 1919, his eye was removed. On July 3, 1919, he obtained from Dr. J. H. Murray, the certifying surgeon appointed under the Factory and Workshop Act, 1901, the following certificate:—

"I ..... hereby certify that, having personally examined James Corser on the 3rd July, 1919, I am satisfied that he is suffering from a disease to which the Workmen's Compensation Act applies, namely, the disease mentioned in the schedule below, against which I have placed my initials, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the Twenty-first day of April, 1919."

The disease in the schedule against which the certifying surgeon's initials are placed is "Ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or

H. L. (Sc.) 1920 — ARCHIBALD RUSSELL v. CORSER. — Lord Birkenhead L.C.

paraffin or any compound product or residue of any of these substances." Under the heading "Symptoms of Disease," the surgeon certified: "He has lost his right eye as the result of corneal ulceration."

The appellants appealed to the Medical Referee against the certificate of the certifying surgeon.

On July 15, the Medical Referee wrote to the Sheriff-Clerk in these terms:—

"DEAR SIR,—James Corser appeared before me yesterday. I regret, however, that I am not in a position to give a decision regarding the certificate of disablement given him by Dr. J. H. Murray on the 3rd July, 1919. The certificate bears that Corser is suffering from ulceration of the corneal surface of the eye, but as his right eye (the one affected) has been removed by operation, I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof.

"Yours faithfully,

"(Sgd.) A. MAITLAND RAMSAY."

On August 11, the Medical Referee dismissed the appeal. Your Lordships are well aware that under the terms of the Act, the decision of the Medical Referee is final.

The Arbitrator found the following facts:—

(1.) That the certificate of July 3 was not a certificate of the alleged disablement as required by s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906.

(2.) That the decision of the Medical Referee did not make the certificate effective.

Having reached these conclusions, he naturally dismissed the application in a note, of which the following are the material parts.

"The certificate on which the pursuer founds his claim is on the face of it self-contradictory. A man, who on the 3rd July had no right eye, could not on that date be suffering from ulceration of the right eye: *Mapp* v. *Straker*. (1) I allowed medical evidence to the effect that without an eye there could

(1) 7 B. W. C. C. 18.

not, from personal examination by a diagnosis, be ulceration. But such evidence was unnecessary for the formation of an opinion on the certificate.

"It was contended for the pursuer that, an appeal having been taken to the Medical Referee and dismissed, there was an end to all challenge of the certificate. But the appeal does no more than confirm the original certificate. It cannot make good what really was not a certificate."

Finally, the Arbitrator submitted the following questions for the opinion of the Court :—

1. Was I justified in finding that the certificate of July 3 was not a certificate of disablement as required by s. 8, sub-s. 1, of the statute ?

2. If the first question is answered in the affirmative was I justified in finding that the decision of the Medical Referee did not make the certificate effective ?

Such, my Lords, is the question which requires decision.

The effect of s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, is to apply to certain industrial diseases the general provisions of the Act relating to compensation for personal injuries by accident. Where the conditions of the Act are satisfied, the workman becomes entitled to compensation "as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment." Under the same conditions, the disablement is "treated as the happening of the accident."

The unusual feature of this case is that the eye was removed on June 9, while the certificate is dated July 3. Nearly a month therefore after the applicant lost his eye altogether the certificate affirms at its date that the appellant "is suffering from" the disease described in the schedule as "ulceration of the corneal surface of the eye." It is contended that the certificate is on the face of it contradictory, and that it cannot be admitted to affirm at its date that the respondent is "suffering from" the disease, inasmuch as a man who on July 3 had no right eye, could not on that date be suffering from ulceration of the right eye.

I find myself unable to accept the conclusion of the

H. L. (Sc.) 1920

ARCHIBALD RUSSELL v. CORSER.

Lord Birkenhead L.C.

Sheriff-Substitute, and am in agreement with the majority of the judges of the First Division.

It is quite true that the words of the Act are "is suffering from" an industrial disease. But these words are not to be construed too literally or too technically. The consequence of doing so would indeed be startling. Indeed, Mr. Sandeman admitted to me that the effect of such a construction, in the case of an emergency operation involving the amputation of a limb, might easily be to deprive the workman of all remedy where the amputated limb was the headquarters of the industrial disease. I imagine that your Lordships would be very reluctant—unless compelled to do so—to adopt such a construction of the Act as would produce a consequence so inhumane. I am much struck by the observations of the Lord President upon this point. He says: "Removal of the diseased organ is not the same thing as the cure of the disease; the disease may no doubt be removed along with the organ, but only at the price of enucleation." The Lord President, without so deciding, points out that the expression suffering from an industrial disease may be construed so as to include "suffering from the results of surgical operation properly incident to the treatment of the industrial disease." I am of opinion that it is necessary so to construe the words under discussion.

The view which I have reached upon this point makes it unnecessary for me to examine the conclusions, very ingeniously presented, which the Lord President himself reached. But I by no means wish it to be supposed, speaking for myself, that I reject his view that the removal of an ulcerated eye is pathologically consistent with the survival thereafter in the patient's body of the disease known as ulceration of the eye. Certainly there is no medical evidence before me in this case which either requires or justifies such a conclusion. Suppose, for instance, that a symptom of ulceration of the eye were acute local neuralgia, and that such neuralgia survived, for a period long or short, the removal of the organ. Would it in such a case be an abuse of language to say that the patient continued to suffer from ulceration of the

eye? Illustrations of this kind are, of course, speculative so long as they are uninformed by medical opinion, but they show, in my opinion, that it would be quite impossible, in reliance upon such evidence as is available in this case, to justify the conclusion reached by the Sheriff-Substitute.

I am, therefore, of opinion that the certificate of July 3 has not been successfully impeached. I am of opinion that the decision on appeal of the Medical Referee cannot be effectively challenged. The record is a little meagre at this part of the case. We are not informed what inquiries, if any, the Medical Referee made in the interval between his letter of July 15 and August 11 when he dismissed the appeal. But it is, of course, clear that, with the guidance supplied by the opinion which I understand your Lordships to have formed, he would have reached the conclusion which in fact he formed. And, as I have already pointed out, there is no appeal from his judgment.

For all these reasons, I am of opinion that the appeal fails, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, a workman has now the right to recover compensation in respect of certain diseases contracted in the course of his employment. One of these is "ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product or residue of any of these substances." A condition of the right to compensation is that the workman should obtain a certificate from the certifying surgeon for the district that the workman is suffering from the disease: Workmen's Compensation Act, 1906, s. 8, sub-s. 1. There is an appeal to the Medical Referee, but, subject to the result of such an appeal, the certificate is conclusive.

The workman in the present case was in the employment of the appellants as a labourer at their colliery, and worked at breaking up blocks of pitch for the manufacture of briquettes. He left his employment on April 21, 1919, because of the condition of his eyes arising from his work. He went to the Glasgow Eye Infirmary and his right eye was removed on June 9, 1919, in consequence of the disease.

H. L. (Sc.) 1920 ARCHIBALD RUSSELL v. CORSER. Viscount Finlay.

On July 3, 1919, he obtained from the certifying surgeon for the district the following certificate :—

"I ..... hereby certify that, having personally examined James Corser on the 3rd July, 1919, I am satisfied that he is suffering from a disease to which the Workmen's Compensation Act applies, namely, the disease mentioned in the schedule below, against which I have placed my initials, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the Twenty-first day of April, 1919."

The disease in the schedule against which the certifying surgeon's initials are placed is "Ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product or residue of any of these substances." As leading "symptoms of disease," the surgeon certified "He has lost his right eye as the result of corneal ulceration."

The employers appealed against this certificate to the Medical Referee, who on July 15, 1919, sent the following letter to the Sheriff-Clerk, who communicated it to the parties :—

"DEAR SIR,—James Corser appeared before me yesterday. I regret, however, that I am not in a position to give a decision regarding the certificate of disablement given him by Dr. J. H. Murray on the 3rd July, 1919. The certificate bears that Corser is suffering from ulceration of the corneal surface of the eye, but as his right eye (the one affected) has been removed by operation, I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof.—Yours faithfully,

"(Sgd.) A. MAITLAND RAMSAY."

The appeal to the Medical Referee was dismissed by him on August 11.

The workman applied for compensation under the Act to the Sheriff-Substitute at Stirling, who, as Arbiter, found that the certificate of the certifying surgeon was not a certificate of disablement as required by the Act, on the ground that

as the eye had been removed it was impossible that the workman should, at the date of the certificate, be suffering from ulceration of that eye, and that as the eye had ceased to exist there could have been no personal examination of it.

That decision was reversed in the Court of Session and the employers now ask on this appeal that the judgment of the Court of Session should be set aside and that of the Sheriff-Substitute, as Arbiter, restored.

The questions are whether the certificate is bad on the ground that as the eye had been removed it was impossible that the workman could, at the date of the certificate, be suffering from ulceration of its corneal surface, and whether the certificate is vitiated by the fact that on the face of it it could not have been given upon personal examination of the eye, as that had been removed.

In my opinion, both these objections fail.

The workman had lost his right eye in consequence of the disease. It is said that at the date of the certificate he was not suffering from an industrial disease, but from the loss of the eye which had been removed in consequence of the disease. In my opinion, this objection could be sustained only upon far too narrow a reading of the Act and Rule. The words "suffering from an industrial disease" in their fair reading must be held to include a case in which the workman is suffering from the result of a surgical operation which the disease rendered necessary.

The second objection is also, in my opinion, unfounded. Though the form of the certificate under the Rules shows that a personal examination of the workman is necessary, there is nothing to show that there must have been an examination of the diseased organ. Such an examination is impossible if the diseased organ had been removed in consequence of the disease before the examination. The certifying surgeon is quite entitled to take into account any other evidence which a medical man would take into account in making up his mind as to what had been the nature of the disease in the eye. He is entitled to hear the statements of the man himself, and to inquire of the surgeon who had removed the

H. L. (Sc.) 1920 ARCHIBALD RUSSELL v. CORSER. Viscount Finlay.

organ the facts as to the conditions which rendered its removal necessary. In all probability the certifying surgeon did make such inquiries before he gave the certificate.

The objections taken are not only of a highly technical nature, but, in my opinion, are also quite unfounded. If there had been any room for doubt as to the facts the case would no doubt have been brought before the Medical Referee for decision by him. The Medical Referee is not confined any more than the certifying surgeon to the results of a personal examination, and he could, by inquiry at the hospital, have satisfied himself beyond all doubt.

I am unable to agree with that part of the Lord President's judgment in which he says that though the eye had been removed there may have remained physical symptoms which would indicate what the nature of the disease had been, and that the certificate may have proceeded upon such symptoms. This seems to me to be extremely improbable in the present case, and if there had been anything of the kind it ought to have been stated, and would have been stated, in the certificate under the heading "Leading symptoms of the disease." I do not think that it would be proper to base any decision in favour of the workman upon a speculation of this sort.

The true answer is that the certifying surgeon is not confined in giving his certificate to the result of the personal examination. He adopted the statutory form for his certificate. I agree that the language of the form is not that which any person who felt himself at liberty to word the certificate for himself in such a case as the present would have adopted, but the certificate that the workman is suffering from the disease in question may quite fairly be read as applicable to the case of a man who had lost his eye in consequence of the disease. He is still suffering from the disease. The employers elected to rest their case purely upon verbal criticism of the form of the certificate instead of taking steps to get the Medical Referee to hear the appeal.

I have no doubt that the decision of the Court of Session in favour of the workman is correct, and should be affirmed.

LORD DUNEDIN. My Lords, the function of the certificate is to assert that the man has had in the statutory sense an accident because of a disease which in a popular sense is not an accident. The actual form which has been issued by the Department is, I think, somewhat unhappily phrased, but I do not think it would be right by a slavish adherence to its literal form to defeat its proper purview under the Act.

I should say more were it not that I have had the advantage of perusing the opinion which is about to be delivered by my noble and learned friend Lord Shaw. That opinion so exactly and felicitously expresses the view I had formed that I feel I can do best by simply saying that I concur in omnibus in my noble friend's opinion.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of having a conference with my noble and learned friend Lord Finlay as to the form and the contents of the judgment he was about to frame in this case. I have had the further pleasure and advantage of reading the print of that judgment which he has just delivered. I so fully concur in every part of it that I feel I could add nothing of advantage to it, and have therefore abstained from writing any judgment myself. I concur with it in all its particulars.

LORD SHAW OF DUNFERMLINE. My Lords, I am of the same opinion.

The respondent, who is 41 years of age, was, on April 21, 1919, employed by the appellants as a labourer breaking up blocks of pitch for the manufacture of bricks. He left his service on that day, and appellants' foreman knew that he was doing so, because of the condition of his eyes arising from his work. He entered the Glasgow Eye Infirmary, and, after five weeks there, he was advised that his right eye ought to be removed. His eye was removed on June 9. These are the admitted facts contained in the stated case; and by these admissions and statements this House is bound.

By s. 8 of the Workmen's Compensation Act, the disablement of a workman or his suspension from work on account

H. L. (Sc.) 1920

ARCHIBALD RUSSELL v. CORSER.

Lord Shaw of Dunfermline.

of an industrial disease entitles him, or his dependants as the case may be, " to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by the accident arising out of or in the course of that employment." That, my Lords, is the governing or ruling enactment upon this subject. I say so purposely, because it is desirable that in the consideration of a remedial statute this substantive part of the Act affirming the right to the remedy should be always and fully kept in view.

Various provisions of the section and various references to schedules are made. All of these are, in my own opinion, executory of this main, substantive enactment. None of them, unless that result be quite unavoidable, should be construed in the sense of revoking or repealing the right to compensation granted by the Act.

It is provided, for instance, in working out the section, that a medical certificate should be got of disablement, and also that that certificate should, so to speak, bring the Act into play by showing that the case of disablement is one arising from industrial disease. From time to time the category of diseases may be enlarged by administrative order under sub-s. 6. There is no question in the present case that the disease referred to is within the last schedule.

To apply these provisions to the present case: Sub-s. 1 provides that where the certifying surgeon " certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act," that is to say, an industrial disease, " and is thereby disabled from earning full wages at the work at which he was employed," then compensation for accident shall follow. Acting upon that provision, the surgeon in this case, Dr. Murray, certified that, having personally examined the respondent, he was " satisfied that he is suffering from a disease " to which the Act applies, i.e., as per the Schedule, " ulceration of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product or residue of any of these substances." Dr. Murray complied to the best of his power with the provisions of the statute and the forms prescribed by the schedule. In my own opinion,

looking to the admitted facts of the case, Dr. Murray's certificate was entirely within the statute.

The attack made upon it is so meticulous as this: that because the eye has had to be removed in consequence of the disease mentioned—namely, ulceration of the cornea—yet, nevertheless, the patient cannot with propriety be said to be suffering from the disease, although he is suffering and must suffer all his life from the loss of the eye. Were it not for the judgments pronounced in this case and some observations in the case of *Mapp* (1), I should hold such a reading of a remedial statute to be incredible. To provide against false claims by requiring a certificate of disablement and its cause, may be reasonable enough, but to interpret the language of that certificate in a way which would eviscerate the right of compensation, which is the substance of the thing conferred by the statute, does appear to me to be wholly unjustifiable. No doubt the Act says that the surgeon has to certify that the workman is suffering from the disease, and no doubt it is possible to say that a workman lamed by amputation or blinded by removal of his eye is not continuing to suffer from the actual disease after the diseased limb or eye has been taken away. But the legislation surely must not have its language interpreted in this grotesque sense, when the workman may through his whole life suffer from blindness or the loss of his limbs.

If I may say so, I entirely appreciate the careful approach which is made to this subject by the learned Lord President of the Court of Session, and I fully agree with the learned judge "that while a surgical operation rendered necessary lest worse should befall may be the indispensable condition of recovery, yet the patient may still continue for the time more or less protracted, to suffer from the disease after its headquarters have been destroyed." One could very easily figure a case of that kind in connection with ocular trouble. But that is not the ground of my judgment. The learned Lord President says that it is unnecessary to resolve the question on any more general ground. In view of what has happened

(1) 7 B. W. C. C. 18.

H. L. (Sc.) 1920

ARCHIBALD RUSSELL v. CORSER.

Lord Shaw of Dunfermline.

and been argued in this case, I think it to be expedient and necessary to do so.

So dealing with the case, I am of opinion that the expression "is suffering from a disease" is well resolved and in no way unduly amplified by the Lord President thus: "The expression, 'suffering from an industrial disease,' can be or ought to be construed so as to include suffering from the results of surgical operation properly incident to the treatment of the industrial disease." In no other way can absurd results be avoided. As Lord Mackenzie truly says: "The argument for the respondents involves this, that though a workman is told his eye must instantly be removed, yet if he submits to this he loses his right to apply for a certificate under s. 8." The learned judge does not think that reasonable; nor do I.

My Lords, this broad view that I have ventured to take seems to me to be in entire accordance with the principles of compensation law. I give this instance. The method of computing compensation by taking an average of the earnings over a certain period, was in one case found to be impossible, because the workman had not been in the employment for the period required for striking the necessary average. That, however, did not deprive, in the view of this House, a workman of the right to compensation; and Lord Halsbury, in *Lysons* v. *Knowles* (1) thus stated the point: "For my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be." My Lords, every argument in this case which fastened upon the present tense, "is suffering," or

(1) [1901] A. C. 79, 86.

the participle "suffering," as a reason for making the Act inapplicable to the cases where the suffering from the actual disease had ceased by reason of amputation or removal of the affected part of the human body, was offered in precisely the same spirit of meticulous criticism as that offered in the case of *Lysons*. Coming from the narrow view of literal interpretation, it falls to be rejected, because it produces a construction which defeats the substance of the Act.

Of course, if an Act of Parliament in unmistakable terms prescribes that this or that avenue and no other shall be the avenue of compensation, then it may follow that what is outside that avenue fails to be within the statute. But this rests on the assumption that the language is, as I say, unmistakably clear and that such a conclusion is unavoidable. I do not think that, or anything like it, is the case in the present instance. The fear of the learned Lord Cullen is that the words "suffering from a disease," if including a case of "suffering from any disabling effects left by a disease no longer resident in the body," involves too wide an extension of the ordinary meaning of the Act. My Lords, with all respect to the learned judge, I cannot agree. I think that, if it did not involve all this, it would result in an unnatural, improper, and indefensible restriction of the meaning of the Act.

My Lords, I am slow in referring to what I think were the mischances of the case before the learned arbitrator. When the Medical Referee was called in, what he appears to have done only requires to be quoted. He saw the applicant on July 14, and next day he wrote to the Sheriff-Clerk this letter:—

"DEAR SIR,—James Corser appeared before me yesterday. I regret, however, that I am not in a position to give a decision regarding the certificate of disablement given him by Dr. J. H. Murray on the 3rd July, 1919. The certificate bears that Corser is suffering from ulceration of the corneal surface of the eye, but as his right eye (the one affected) has been removed by operation, I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof.

"Yours faithfully,

"(Sgd.) A. MAITLAND RAMSAY."

H. L. (Sc.) 1920

ARCHIBALD RUSSELL v. CORSER.

Lord Shaw of Dunfermline.

The letter was communicated to the parties, and on August 11, the Medical Referee dismissed the appeal. He had had the injured man before him; he had Dr. Murray's certificate before him, and then he says, "I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof." My Lords, I cannot understand why, when this doctor had the man without the eye before him, he did not simply inquire how he had lost his eye. There was nothing to debar him from that or to preclude him from making sensible inquiries, say at the hospital, or elsewhere. He, however, did not do so, and appeared, so to speak, to remit the case for proof to the Sheriff, and then he dismissed the appeal. I cannot hold that that procedure was in furtherance of the statute.

When, however, the case reached the Sheriff, that learned judge did not ask the Medical Referee to get to the bottom of the truth of the case and help the Court, but he made findings that Dr. Murray's certificate was not a certificate as required by the Act, and consequently that the Medical Referee's decision did not make it effective. By this process the procedure got entirely out of hand. It is not necessary to dwell upon the subject, for I agree with your Lordships in holding that the construction of the Act, upon which the learned arbitrator proceeded, is erroneous.

With reference to the case of *Mapp* (1) I desire to say that, in my own opinion, it is not a judgment which should be followed, lending, as it does, support to the view of that defeating of the Act which I think its true construction should avoid.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 17, 1920.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agent for the respondent: *Herbert Z. Deane, for Thos. Scanlan & Co., Solicitors, Glasgow, and R. D. C. McKechnie, Solicitor, Edinburgh.*

(1) 7 B. W. C. C. 18.

[HOUSE OF LORDS.] H. L. (I.)*

1920
Dec. 20.

DUNLOP RUBBER COMPANY, LIMITED APPELLANTS;

AND

DUNLOP . . . . . RESPONDENT.

Service out of Jurisdiction—Libel Action—Injunction—Rules of the Supreme Court (Ireland), 1905, Order XI., *r.* 1 (*g*).

The plaintiff, who resided in Ireland, obtained leave by an order made in the Chancery Division in Ireland under Order XI., r. 1 (*g*), of the Rules of the Supreme Court (Ireland), 1905, whereby service out of the jurisdiction of a writ of summons may be allowed by the Court or a judge whenever any injunction is sought as to anything to be done within the jurisdiction, to serve a writ upon the defendant company, which had its registered office in London, in an action for an injunction to restrain the company from publishing in Ireland advertisements containing pictures of the plaintiff calculated to expose him to public ridicule by misrepresenting his appearance or costume. The plaintiff, who had invented a pneumatic tyre, had assigned his interest in the invention to the defendant company and the pictures complained of were used as advertisements of the tyre:—

Held, that the discretion conferred by Order XI., r. 1 (*g*), had not been exercised on any wrong principle, and that there was no ground for setting aside the order.

Order of the Court of Appeal in Ireland affirmed.

APPEAL from an order of the Court of Appeal in Ireland affirming an order of Powell J.

The appellants were a limited company having their registered address in London. The respondent was an old gentleman residing in Dublin.

On January 16, 1920, the respondent obtained leave by an order made in the Chancery Division in Ireland to serve a writ of summons upon the appellants in an intended action between the respondent and the appellants for an injunction to restrain the appellants from printing, publishing, or exhibiting in Ireland any advertisements, etc., containing pictures representing him in absurd or unsuitable costumes or attitudes, or caricatures of him, or otherwise calculated to expose him to public ridicule or contempt by

* *Present:* LORD BIRKENHEAD L.C., LORD ATKINSON, LORD MOULTON, and LORD BUCKMASTER.

H. L. (I.) 1920

DUNLOP RUBBER COMPANY v. DUNLOP.

misrepresenting his appearance or costume. The writ also included a claim for damages but the respondent disclaimed any intention to insist upon this claim.

The respondent, by his affidavit in support of his application for leave, deposed that he was the inventor of a pneumatic tyre, and that in 1891 he presented the appellants' predecessors in title with a portrait bust of himself and his signature to be used as a trade-mark, and that for some time past the appellants, without his permission, had been exhibiting in Ireland and elsewhere advertisements containing pictures intended to represent him, the features being adapted from the portrait bust, but that the features were placed upon the body of a very tall man dressed in an exaggeratedly foppish manner, wearing a tall white hat, a white waistcoat, and carrying a cane and eye-glass, none of which was it his custom to wear or carry. By Order XI., r. 1, of the Rules of the Supreme Court (Ireland), 1905, "service out of the jurisdiction of a writ of summons or a notice of a writ of summons may be allowed by the court or a judge whenever :—(*g*) 'Any injunction is sought as to anything to be done within the jurisdiction.'" On being served with the writ of summons at their registered office in London the appellants moved to discharge the order of January 16, 1920, and to set aside the writ and the service thereof.

Powell J. refused the application, and this refusal was affirmed by the Court of Appeal in Ireland (Campbell L.C. and Ronan, and O'Connor L.JJ.).

Sir John Simon K.C. and *T. M. Healy K.C.* (of the Irish and also of the English Bar) (with them *Wrottesley* (of the Irish Bar)) for the appellants. The discretion conferred by Order XI., r. 1 (*g*), of the Rules of the Supreme Court (Ireland), 1905, which is similar to Order XI., r. 1 (*f*), of the Rules of the Supreme Court in force in this country, has been exercised on a wrong principle and the orders of the Courts below should be set aside. Before the Judicature Acts the Court of Chancery had no jurisdiction to grant an injunction to restrain a libel, and although the Chancery Division has now

power to grant an injunction in such cases it is a power which should be rarely exercised. According to the test laid down by Lord Selborne in *Capital and Counties Bank* v. *Henty* (1) it is at least doubtful whether these pictures in the mind of any reasonable man are capable of bearing any defamatory meaning. That, no doubt, is a question for the Court, but the question of libel or no libel is a question for the jury. Therefore this exceptional jurisdiction ought only to be exercised in the clearest cases where any jury would say that the matter complained of was libellous or where, if the jury did not so find, the Court would set aside the verdict as unreasonable. Otherwise the Court would be usurping the functions of the jury in a matter in which either party is entitled as of right to insist upon a jury: *Monson* v. *Tussauds.* (2) In *Saxby* v. *Easterbrook* (3), which is the first reported case in which an injunction was granted to restrain the publication of a libel, the jury had found the matter to be libellous, and the Court relied upon that fact as the main ground of their decision. Although this is an appeal upon a matter of discretion, if the discretion has been exercised on wrong principles its exercise is open to review. In exercising this discretion, where the question is whether an action shall be tried in one part of the United Kingdom or another different considerations apply from those which apply to a dispute between a British subject and a foreigner. In the former case the plaintiff must show good and sufficient cause for withdrawing the action from its proper forum: *Marshall* v. *Marshall* (4); *Kinahan* v. *Kinahan* (5); *Watson* v. *Daily Record* (*Glasgow*). (6) The last cited case is closely analogous to the present, and in that case the Court of Appeal reversed the exercise of the discretion by the judge of first instance. The inconvenience of trying an action of this kind in Ireland is such as would cause a serious hardship to the appellants, as it would involve taking over a large number of witnesses to Dublin from London, which is the

(1) (1882) 7 App. Cas. 741, 745.
(2) [1894] 1 Q. B. 671, 692–3.
(3) (1878) 3 C. P. D. 339.
(4) (1888) 38 Ch. D. 330.
(5) (1890) 45 Ch. D. 78.
(6) [1907] 1 K. B. 853.

H. L. (I.) 1920 DUNLOP RUBBER COMPANY v. DUNLOP.

headquarters of the appellant company. That has been held to be a material consideration on this question: *Logan* v. *Bank of Scotland* (*No.* 2). (1) Nor is there any justification for saying that the respondent cannot travel to England. It may be difficult to maintain that the Chancery Division in Ireland has no jurisdiction to grant an injunction in a case of this kind, but the granting of an injunction to restrain a libel is very unusual. These objections, taken together, show that the discretion to allow service of the writ out of the jurisdiction has been improperly exercised.

[They also referred to *O'Connor* v. *Star Newspaper Co.* (2); *Tozier* v. *Hawkins.* (3)

S. L. Brown K.C. and *A. C. Newett* (both of the Irish Bar) for the respondent were not called on.

LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal in Ireland of April 29 of the present year affirming an order of Powell J. which was made on March 19 in an action in the Chancery Division. The plaintiff in the action is a Mr. John B. Dunlop whose residence is in Dublin and the defendants are the Dunlop Rubber Co., Ld., a firm whose principal place of business is in London. The claim in the writ is for an injunction to restrain the defendants from publishing or exhibiting in Ireland any advertisements or placards, books or circulars containing pictures representing the plaintiff in absurd or unsuitable costumes or attitudes, or caricatures of him, or otherwise calculated to expose him to public ridicule or contempt by misrepresenting his appearance or costume.

The question which requires decision is whether in terms of the order, to which I will more particularly direct attention in a moment, there has been a proper exercise of discretion made by the Irish Courts in allowing an injunction under the circumstances which I have indicated.

The material paragraph of Order XI. is r. 1 (*g*): "Service out of the Jurisdiction," so it is provided by r. 1, "of a Writ

(1) [1906] 1 K. B. 141, 151. (2) (1891) 30 L. R. Ir. 1.
(3) (1885) 15 Q. B. D. 650.

of Summons or a notice of a Writ of Summons may be allowed by the Court or a Judge whenever :—(*g*) Any injunction is sought as to anything to be done within the jurisdiction or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof." It is convenient to make it plain at this stage that, although a claim to damages is included in the writ (which has not been the subject of formal amendment) it was made clear before your Lordships, and in the Courts below, that the plaintiff in fact did not intend to persevere in that claim.

The question which arises here is whether or not the judges in Ireland have made a wrong exercise of a discretion. It is true that at one period in his argument Sir John Simon carried the matter further and contended that there was no power, having regard to the terms of Order XI., r. 1 (*g*), to grant an injunction under the circumstances which arise in this case ; but he did not make a serious attempt by argument to satisfy your Lordships that such was the case, and I am persuaded that it is not possible on the plain words of the order to found such a contention successfully. We must therefore approach the matter upon the basis that there is such a jurisdiction, but that it is a jurisdiction which would naturally, especially on the Chancery side, be cautiously and sparingly employed. The judges below have made an exercise of their discretion, and the question therefore that I have to ask myself is this : Am I able to say that they have exercised their discretion so evidently upon a wrong principle that that which they have done must be corrected ? My Lords, I am able to lay down no such rule. It is not necessary for me to say, and I do not say, whether, if I had been trying this case myself, I should have reached a similar conclusion ; all that is necessary for me to say is that I am able to discern no ground of any kind for the conclusion, nor did the learned counsel supply me with any such ground in argument, that the judges below exercised their discretion upon principles so manifestly unsound that their decision must be reversed. Sir John

H. L. (I.) 1920 DUNLOP RUBBER COMPANY v. DUNLOP. Lord Birkenhead L.C.

Simon attempted to avoid this difficulty by saying that the discretion which had been exercised faultily had been so exercised not so much in relation to any one particular point as to an accumulation of small objections the aggregate result of which (if I understood his contention aright) must be to show that it was exercised on indefensible principles. But if there is one trivial and unsustainable objection to a course which has been adopted, it does not in my opinion strengthen it if one adds other equally trivial causes of objection. I myself am unable to gather from the course of the argument any substantial ground upon which the judgments in the Courts below can be impeached having regard to the principle upon which our examination of them must proceed.

My Lords, it was said in the Court below, and it has been said in other cases which were cited to us as authorities, that such an injunction would not be granted, and ought not to be granted, unless the Court was satisfied of the existence of a serious libel, unless indeed it was prepared confidently and completely to anticipate what the view of a jury would be when it tried the case. I am not sure that in some of the passages cited the case was not in this particular put rather too high. It is sufficient for me to say that the judges who tried this case have reached the conclusion (and I agree with them) that the exhibition of these pictures constituted a circumstance in which that which was done was at least capable of a defamatory meaning. The judges in the Court below properly and cautiously abstained from any indication of feeling which might in any way prejudice the hearing of such a case if ever it reaches a later stage. And I think it is desirable to repeat here the caution which was insisted upon in the Court below, and to make it plain to the parties, that they would do well not to place any excessive reliance upon the dicta proceeding from their Lordships in the course of this argument, for they are in the nature of the case dicta which were made obiter.

A further point requires a moment's observation. It was contended here, and apparently the view was acquiesced in by two members of the Irish Court of Appeal, that the result

of making such an order as the present was to diminish, or weaken, the admitted right of the parties to such an action that the issues therein shall be determined by a jury. That right, my Lords, in Ireland and in England is of great antiquity, and it is not necessary, because there is no controversy as to its existence, to trace its history. It is perfectly true that in terms Fox's Act dealt only with criminal matters, but long practice and a succession of authorities little likely at this day to be questioned have treated it as being of equal force and validity in civil matters.

The question then with which we are confronted is this, that the appellants here say that we are leaving to the discretion of a judge to determine that which the parties are at present, having regard to the proviso to the Irish Judicature Act of 1877, entitled to insist upon as a right. This objection is ill-founded. The matter, it is true, is committed to the discretion of a Chancery judge; but to what circumstances has he to apply that discretion? He has to ask himself, Am I to grant, or am I to withhold, a jury to a plaintiff who under the existing law is entitled ex debito justitiæ to a jury? How can it be contended that a judge would be making a proper, or a defensible, exercise of his discretion, if he used it to deny to a plaintiff that to which under the law of the land the plaintiff is properly entitled? My Lords, if such a discretion were so exercised it may be anticipated that the Court of Appeal in Ireland would deal suitably with the matter; and it is certain that, if the Court of Appeal in Ireland failed to do so, such an exercise of discretion would be corrected by your Lordships in this House. The objection therefore which is taken under this head possesses no substance.

I am for these reasons of opinion that the discretion which was exercised in the Courts below has not been successfully assailed. I agree that the jurisdiction is one to be sparsely exercised; it ought not to be used unless in a very exceptional case. It may be, though it is not for me to decide it, that this is such an exceptional case. The plaintiff in this case is an old gentleman who resides in Ireland; he professes himself

H. L. (I.) 1920 DUNLOP RUBBER COMPANY v. DUNLOP. Lord Birkenhead L.C.

to be indifferent to ridiculous reproductions of his appearance in any country but Ireland; it is to their production in Ireland that his complaint in these proceedings is confined. There is in fact considerable reason for supposing that the order which is now under consideration may have been intended to deal with a case such as this where the complaint is locally made, where the mischief complained of is only resented locally, and where the remedy which is given may be made effective locally.

I only make one further observation. At one period in the course of the case counsel for the respondent indicated that their client was prepared to content himself with the injunction which has been obtained, and that he did not propose either in these or any other legal proceedings, to make a complaint of the reproduction of these or similar pictures in any country other than Ireland. As I understood what was said, this amounted to an offer which would have been a term in the settlement of the proceedings under review had such a settlement been reached. I want to make it clear, so far as I am concerned, and so far as anything which has taken place before your Lordships to-day goes, that nothing in the result has been conceded by the respondent, and that he is still in full possession of any legal right which, having regard to the history of these proceedings, he enjoyed when he entered your Lordships' House. What was offered was offered as a term of settlement, and no offer of settlement has apparently been forthcoming.

My Lords, for the reasons I have given this appeal fails and should be dismissed, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I concur. The order appealed from was a discretionary order; it should not be disturbed unless the House is of opinion that that discretion has been exercised on some wrong principle. I am entirely unable to come to that conclusion in this case.

With regard to a matter which apparently has disturbed or caused the apprehension of, the appellants here, and induced them probably to lodge this appeal—namely, as to

whether their right to the trial of an action for libel by jury was either infringed upon or jeopardised—I wish to say that in my opinion the form which these proceedings have taken cannot deprive a litigant of any right to trial of such an action by a jury which he may have either under statute or by common law.

LORD MOULTON. My Lords, I concur. I should be very loth to take away from an inhabitant of one part of the United Kingdom his right to have actions brought against him in a Court of his own country. There is, however, clearly a discretion in the Courts to permit it, and there are circumstances in this case which the Courts in Ireland thought sufficient to justify the exercise of their discretion in this way. I am very unwilling to interfere with such a discretion, and I do not think this is a case in which we should do so. The libel that the plaintiff complains of is, of course, a libel by publication in Ireland ; he does not seek damages and, considering all the circumstances of the case, I think the leave was granted rightly.

THE LORD CHANCELLOR. My Lords, I ought to inform your Lordships that I generally informed Lord Buckmaster of the nature of the judgment I proposed to deliver, and that he assents to the views I have expressed.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 20, 1920.

Solicitors for the appellants : *John B. & F. Purchase, for H. C. Neilson & Son & Dawson, Dublin.*

Solicitors for the respondents : *Cattarns & Harris, for Frederick G. Sharpe, Dublin.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1920 Nov. 30.

MACLAINE AND OTHERS . . . . . APPELLANTS;

AND

GATTY AND ANOTHER . . . . . RESPONDENTS.

Right in Security—Punctual Payment—Reduction of Rate of Interest on punctual Payment—Construction—Estoppel.

By a bond and disposition in security dated Nov. 9, 1910, a loan was effected on the security of a Scottish estate, the loan to be repaid on the following Whitsunday with interest during non-payment at the rate of 5 per cent. per annum, payable on Feb. 1, May 1, Aug. 1, and Nov. 1 in each year; and by a minute of agreement of even date with the bond it was agreed (1.) that on the punctual payment of interest as thereafter modified the loan should not be called in for fourteen years, and (2.) that the 5 per cent. interest stipulated for in the bond should be modified to 4 per cent. so long as the interest at said lower rate was punctually paid. By a letter of April 29, 1918, the lenders demanded payment of the instalments of interest due on Feb. 1 and May 1, 1918, respectively, and stated that unless the interest were in future regularly and punctually paid interest at the rate stipulated for in the bond would be exacted. On May 13 payment of interest for the two quarters at the lower rate was made and was accepted without demur. On Aug. 7 the borrower sent a cheque for the interest due on Aug. 1, but it was returned as being neither timeous nor sufficient:—

Held, (1.) that default had been made in the punctual payment of interest, and (2.) that the lenders were not estopped by their conduct from insisting on their strict rights under the bond.

Dictum of Lord M'Laren in *Scott-Chisholme* v. *Brown* (1893) 20 R. 575, 580 disapproved.

Leeds and Hanley Theatre of Varieties v. *Broadbent* [1898] 1 Ch. 343 approved and followed.

Nova Scotia Steel Co. v. *Sutherland Steam Shipping Co.* (1899) 5 Com. Cas. 106 considered and distinguished.

Interlocutor of the First Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary.

The facts of the case are fully stated in the opinion of the

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

Lord Chancellor, but the following summary may be useful to indicate the nature of the dispute.

By a bond and disposition in security dated November 9, 1910, the appellant Maclaine borrowed from the respondents the sum of 36,000*l.*, which sum he bound himself to repay at the term of Whitsunday, 1911, and the interest of said principal sum during the not payment of the same at the rate of 5*l.* per cent. per annum and that by equal quarterly payments on February 1, May 1, August 1, and November 1, in each year, with a fifth part more of the interest due at each of the dates of payment of liquidate penalty in case of failure in the punctual payment thereof, and in security of the personal obligations so written he disponed to the respondents his estate of Lochbuie in the Island of Mull.

By a minute of agreement of even date relative to the said bond and disposition in security it was agreed (by article second) that provided, in addition to the fulfilment by the said appellant of certain other conditions, the interest of the loan were punctually paid in terms of the bond as modified by article third of the minute of agreement, the respondents would not call in the loan for fourteen years from Martinmas, 1910; and by article third it was further agreed that the 5 per cent. interest stipulated for in the bond should be modified to 4 per cent. so long as the interest at said lower rate was punctually paid.

By a bond and disposition in security and minute of agreement dated March 16, 1911, the appellant Maclaine borrowed from the respondents a further sum of 2000*l.* on the same security and on the same terms.

In March, 1912, the appellant Maclaine granted a trust deed in favour of the remaining appellants, and thereafter the respondents dealt with the trustees as regards all matters connected with these loans.

On August 7, 1918, the appellants' agents sent a cheque to the respondents' agents for the quarter's interest due on the bonds on August 1, 1918, as modified by the minutes of agreement, but the cheque was returned with the intimation that it was neither timeous nor sufficient.

H. L. (Sc.) 1920 MACLAINE v. GATTY.

After some further correspondence the respondents raised this action against the appellants in the Court of Session for a declaration that the interest due to the respondents on August 1, 1918, in respect of the two bonds and dispositions in security and relative agreements was not punctually paid, and that the respondents were in consequence entitled to call up the bonds free of the restrictions contained in the agreements, and they further claimed payment from the appellant Maclaine of the interest due on the bonds on August 1, 1918, at the higher rate of 5 per cent.

The appellants pleaded (inter alia) (1.) that there had been no default in the punctual payment of interest, and (2.) that the respondents were barred by their conduct, as shown by the correspondence, which is set out in the opinion of the Lord Chancellor, from insisting upon their strict rights under the bonds.

The Lord Ordinary (Lord Sands) held that the payment was punctually made and dismissed the action.

The First Division by a majority (The Lord President, Lord Strathclyde, Lord Skerrington, and Lord Cullen; Lord Mackenzie dissenting) reversed this decision and granted decree in terms of the conclusions of the summons.

1920. Nov. 29, 30. *Hon. Wm. Watson K.C.* (of the Scottish Bar) and *Schwabe K.C.* (of the English Bar) (with them *D. P. Fleming* (of the Scottish Bar)) for the appellants.

1. The word "punctually" must be read in a reasonable sense and it is a question of circumstances whether or not a slight delay is failure in punctual payment. In a stipulation for reduction of interest provided it is punctually paid the word "punctually" is more elastic than if the proviso was for payment on the day named: per Lord McLaren in *Scott-Chisholme* v. *Brown*. (1) Lord Low and Lord Kinnear also support the appellants' contention. Lord President Robertson, in whose judgment Lord Adam concurred, took the contrary view. *Ford* v. *Earl of Chester-*

(1) 20 R. 575, 580.

field (1) and *Leeds and Hanley Theatre of Varieties* v. *Broadbent* (2) are distinguishable in their facts. *Nova Scotia Steel Co.* v. *Sutherland Steam Shipping Co.* (3) is a direct authority in the appellants' favour.

2. The respondents are estopped by their conduct from maintaining their strict rights under the bonds: *Paterson* v. *Tod.* (4) [Upon this point they also referred to *Mitchell* v. *Heys* (5), *Jorden* v. *Money* (6), *Chadwick* v. *Manning* (7), *Carron Co.* v. *Henderson's Trustees* (8), *Ex parte Moore.* (9)].

3. At all material times the appellant Maclaine was abroad on foreign service and was prevented from seeing that arrangements were made for the due payment of the interest. In those circumstances he claims to be excused from punctual payment under the Courts (Emergency Powers) Act, 1917, s. 3.

H. P. Macmillan K.C. and *Morrice Mackay K.C.* (both of the Scottish Bar) for the respondents were not called on.

LORD BIRKENHEAD L.C. My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated March 12, 1920, recalling an interlocutor of Lord Sands of March 12, 1919, and discerning against the defenders, the present appellants, in the terms of the conclusions of summons. The facts giving rise to the present dispute are shortly as follows. The appellant, Maclaine, borrowed on November 9, 1910, a sum of 36,000*l.* on the security of his estate in Lochbuie in the Island of Mull. The transaction was carried out by means of two documents—firstly, a registered bond and disposition in security, by the provisions of which the sum advanced was to be repaid at the term of Whitsunday, 1911, and interest was payable at the rate of 5 per cent. per annum, secondly a minute of agreement whereby on certain conditions which are immaterial to any issue arising here the respondents

(1) (1854) 19 Beav. 428.
(2) [1898] 1 Ch. 343.
(3) 5 Com. Cas. 106.
(4) (1828) 6 S. 1062.
(5) (1894) 21 R. 600, 610.
(6) (1854) 5 H. L. C. 185, 213-4.
(7) [1896] A. C. 231.
(8) (1896) 23 R. 1042, 1053.
(9) (1876) 2 Ch. D. 802.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Lord Birkenhead L.C.

agreed that they would not call in the loan for fourteen years from the term of Martinmas, 1910, and that the interest should be payable at the rate of 4 per cent. per annum. It was further made an express condition that the interest should be punctually paid. The actual words of the agreement are as follows: "(2.) Provided the covenant in Article 1 hereof be duly observed, and the interest of the loan be punctually paid in terms of the bond and disposition in security as modified by the immediately succeeding clause, Article 3 hereof, the lenders agree not to call in the loan for a period of 14 years from and after the term of Martinmas (being 11th November) 1910." Art. 3 is in these terms: "Notwithstanding the said bond and disposition in security specifies 5 per cent. per annum as the rate of interest which the loan is to bear, the lenders agree to modify the rate to 4 per cent. per annum provided and so long as punctual payment shall be made of interest at said lower rate." . . . .

On April 16, 1911, Maclaine borrowed a further sum of 2000*l.* on terms so far as they are material identical with those of the earlier loan.

At the date of the first advance and for some years following the respondent Sir Stephen Gatty was the tenant of Lochbuie at a rent which exceeded the amount of interest falling due in respect of the said loans, but he took advantage of the terms of his lease to terminate his tenancy on October 31, 1917. That circumstance prevented any question of punctuality in the payment of interest arising until a date with which I will presently deal. In the meantime, in March, 1912, the appellant, Maclaine, had made a trust deed in favour of the Lochbuie trustees, the remaining appellants, who thereafter became owners in fee of the estates in question. In October, 1917, and for some considerable period afterwards Maclaine was on duty with His Majesty's forces abroad, and the rent due in respect of the quarter ending November 1, 1917, was not paid until April, 1918, although two applications had been made by the agents of the Lochbuie trustees. I only advert to this circumstance because it was mentioned

in argument and some stress was laid upon it in the case. The interest on the loans falling due in 1918 could no longer be met out of the rent which formerly had accrued from the lenders, and consequently it became necessary to make some other arrangement to discharge the payments as they fell due. The first of such payments became due on February 1, 1918, and a request for payment was made by the lender's agents on April 11, 1918, and on April 29 of the same year they repeated their request in a letter from which the following is an extract: "Referring to our letter of 18th instant, we must ask you to let us have without further delay a remittance for the interest payable on our Clients' bonds on 1st February last. Another quarter's payment of interest, amounting to 285*l.*, falls due on 1st proximo, and you may be so good as to send us a remittance for it at the same time. We are instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (5 per cent.) stipulated in the bonds will be exacted."

Payments were in fact not made until May 13, 1918, and were accepted without comment or protest at the lower rate of 4 per cent. On July 24, 1918, the respondents' agents wrote to the trustees' agents sending a note of interest due at August 1, 1918, and requesting a remittance in due course. It is convenient that I should read this; it was in these terms: "Sir Stephen and Lady Gatty—Interest on Loans. Dear Sirs,—We send you herewith note of interest due to Sir Stephen and Lady Gatty by the Maclaine of Lochbuie in respect of loans over the Estate of Lochbuie as at 1st proximo, and shall be glad to receive a remittance for the amount of the interest, less tax, in due course. Your's faithfully, John C. Brodie & Sons." On August 7, 1918, a cheque in payment was sent by the appellants' agents, but the cheque was returned on the ground that the tender was not timeous or sufficient, and payment was demanded at the rate of 5 per cent. At the same time an intimation was given that the respondents held themselves at liberty to exercise their rights and powers under their bonds free

H. L. (Sc.) 1920

MACLAINE v. GATTY.

Lord Birkenhead L.C.

from any restrictions imposed by the back agreement which accompanied and modified the bonds.

Various explanations of the delay are given in the letter of the trustees' agents of August 14, 1918. I do not think it necessary to dwell upon those explanations because, although they may aggravate the apparent harshness of which the appellants complain, they cannot in my judgment modify in any way the resultant legal situation. A claim was made that the interest had not been punctually paid within the meaning of the back agreements, which accordingly had ceased to apply, so that the rights of the parties, such is the pursuer's contention, were held to be governed by the bonds alone. This claim was not admitted by the appellants, and the respondents commenced the proceedings which have resulted in the appeal to your Lordships.

My Lords, the questions which require decision now are two: in the first place whether payment made under the circumstances indicated in the short statement of facts which I have thought it necessary to make, is a payment punctually made on August 1; and the second question which has been argued at the Bar is whether if your Lordships do conclude that payment was not punctually made, the conduct of the pursuer was such as to preclude him, having regard to the familiar principles of estoppel or bar, from contending before your Lordships here that he is entitled to avail himself of his literal rights under the relevant instrument.

I will deal with those points in order. The first question is a short one: where a party has contracted that he will make a payment punctually upon a day specified, can he be heard to say that that payment is a payment punctually made if in fact it is made at a later date?

My Lords, in a matter which would have seemed to me to be clear, had there not been a difference of judicial opinion in the Courts below, I am of opinion that where an instrument clearly expresses that payment is to be made punctually on a day specified, such a payment is not so made unless it is made upon that day. Some authority was referred to by

Mr. Watson in the Scotch Courts which certainly pointed in the opposite direction. He referred particularly to the case of *Scott-Chisholme* v. *Brown* (1), and the passage in that judgment which assists his argument most, is to be found in the judgment of Lord M'Laren. The passage is as follows: "I think the difference between a stipulation that an abatement is to be given if the rent is punctually paid and a stipulation that an abatement shall be given if the rent is paid at the 'time' is only this, that the word 'punctually' is a little more elastic, and would cover the case of rent paid within a few days after it is due, or as soon as it is demanded." My Lords, I must not, speaking for myself, be taken as assenting to the distinction which the learned judge draws between a stipulation that rent shall be punctually paid and a stipulation that an abatement is to be given if the rent is paid at the time, and I am bound expressly to dissociate myself, having regard to the view which I have formed, from his further expression of opinion that the word "punctually" in such a case would cover the case of rent paid within a few days after it is due. It is worth observing (as I did during the argument) that the opinion expressed by this learned judge in that sense was an opinion which must be treated as "obiter" having regard to the fact that the period of delay in the case under consideration was notably longer than that with which we are concerned. And the decision in fact was that the actual payment in that case was not timeous.

The point is important, nor has this House hitherto pronounced upon it. It is therefore worth while to add a few further observations. Mr. Watson was driven, and I think irresistibly driven, to the admission that had the words in the instrument which require construction been that the payment of interest was to be made upon August 1 without containing the word "punctually," the payment would have been peremptorily due upon that day, and that no such latitude could have been argued for in that event as on the existing language he conceives himself at liberty to claim.

(1) 20 R. 575, 580.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Lord Birkenhead L.C.

This admission involves its mouthpieces in a very strange and untenable position, because they are driven to contend that a man who has stipulated on his own behalf that a person who contracts with him is to pay him on August 1 punctually is actually in a worse position than he who has contracted that he shall be paid on August 1 simpliciter. The suggestion that the cautious insertion of the word " punctually " is actually to be treated as importing an element of unpunctuality seems to me a paradox which only great courage could propose. When I address myself to the different authorities, as I will shortly do, which have been cited at the Bar, I am confirmed rather than shaken in the unfavourable impression which I have formed.

I refer in the first place to the decision in *Leeds and Hanley Theatre.* (1) This case of all those cited at the Bar in its facts most closely resembles the matters now under consideration. The headnote in that case, which is extremely short, is as follows: " A mortgage deed contained an agreement that the payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years from the date of the deed ' if in the meantime every half-yearly payment of interest shall be punctually paid :—' Held, by the Court of Appeal (reversing the judgment of Kekewich J.) that payment ' punctually ' meant payment on the day fixed for payment, and that payment nine days after such fixed day was not good payment." My Lords, I read this case, while the learned counsel was referring to it, with considerable care, and I am quite unable to assent to the suggested distinctions between it and the present case which Mr. Watson attempted to draw. On the contrary, I desire to adopt and associate myself with the judgment that was given by the present Lord Lindley, the Master of the Rolls, in that case. He reads the words which resemble those which fall to be construed in the present case and, having done so, continues: " That surely means if, in the meantime, every half-yearly payment of interest is paid on the days specified in the covenant. I do not think you want

(1) [1898] 1 Ch. 343, 349.

authority to shew that 'punctually' means punctually on the day fixed for payment; and I am not aware of any authority which shews it does not. According to the plain language, the mortgagees are in the right. The money was not paid on the day, nor for several days afterwards, and no attempt was made to provide for payment at all on August 15, when the first half-yearly interest became payable; and there being no sign of payment, the mortgagees served a notice calling in the money."

My Lords, an authority was referred to by Mr. Watson, which is somewhat in his favour, and upon which therefore I make an observation. It was the case of the *Nova Scotia Steel Co.* v. *Sutherland Steam Shipping Co.* (1) This case was concerned with the charter of a steamer for three months at a monthly hire, payment to be made monthly in advance, and, failing the punctual and regular payment of the hire, it was provided that the owners were to be at liberty to withdraw the vessel from the service of the charterers. The second month's hire was payable on July 12; the hire was in fact tendered on July 14, and Bigham J., as he then was, held that there had been a punctual and regular payment of the hire. My Lords, the language used in the charterparty in that case was not so precise as that which is now under consideration in the present case, and the learned judge did not give extensive or detailed consideration to the point which requires decision in the present case. I do not think it necessary to reach a conclusion as to whether, in the different language and under the different circumstances which it was necessary for the learned judge to construe and deal with, I should agree with him, but the view which he reached in the *Nova Scotia Case* in no way affects the decision I have formed with regard to the first part of this case.

I have only to add that it would be a very singular circumstance if he who had been careful to stipulate that certain payments of interest under an instrument of this kind should be made to him punctually upon a certain specified day, were deprived by a decision of the Law Courts of the right

(1) 5 Com. Cas. 106.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Lord Birkenhead L.C.

of insisting upon the strict implement of that for which he had so stipulated. It would be both undesirable and dangerous that Courts of law should set up an elastic and, from the nature of the case, an undefinable judicial discretion in substitution for the expressed agreement of the parties to the instrument. So much, my Lords, for the first point which has been argued at the Bar.

It is then further contended that even if according to its original tenor properly construed the respondents were entitled to require that the payments of interest should be made punctually on the days specified, they have by their conduct in this matter precluded themselves from raising such a contention under the existing circumstances.

The learned counsel cited various authorities in which these doctrines have been discussed, but the rule of estoppel or bar, as I have always understood it, is capable of extremely simple statement. Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time. Whether one reads the case of *Pickard* v. *Sears* (1), or the later classic authorities which have illustrated this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine.

Approaching then the facts of this case I ask myself where is the evidence of any such representation, either by words or by conduct, on the part of the pursuer as to preclude him in this case from reliance upon the strict letter of his contract ? It is said that when an instalment was asked for in the letter of April 29, 1918, a course of conduct was set in train which justifies the contention advanced. I will read that letter : " Dear Sir,—Referring to our letter of 18th instant, we must ask you to let us have without further delay a remittance for the interest payable on our Clients' bonds on 1st February last. Another quarter's payment of interest, amounting to 285*l.*, falls due on 1st proximo, and you may be so good as to send us a remittance for it at the same time. We are

(1) (1837) 6 A. & E. 469.

instructed to say that unless the interest be in future regularly and punctually paid, interest at the rate (5 per cent.) stipulated in the bonds will be exacted."

Upon this letter, two observations may conveniently be made. In the first place the payments of interest under discussion in that letter are the first payments of interest which had been made at all, having regard to the balance slightly in favour of Lochbuie upon an adjustment of the two accounts. We are then dealing from this date with a new state of things, and at this point of time the respondents in the clearest possible manner place on record their intention of insisting strictly upon their legal rights under the instrument. The money was in fact paid on May 13. Upon its acceptance without protest by the respondents and upon the letter written on May 1 is founded a contention that the respondents were thereafter precluded from insisting upon the letter of their contract. My Lords, I am unable to agree that in such a case as this, where there has been a single acquiescence, not unexplained, in a single tardy payment, the party accepting it rendered it thereafter impossible for him to require that payment should be made at the due date. Even if no express notice had been sent to the appellants, I should still think that there had been no conduct in this case which would have prevented the respondents from insisting upon their right; but in fact on July 24, 1918, we find the respondents' agents writing in these terms: "Dear Sirs,—We send you herewith note of interest due to Sir Stephen and Lady Gatty by the Maclaine of Lochbuie in respect of loans over the estate of Lochbuie, as at 1st proximo, and shall be glad to receive a remittance for the amount of the interest, less tax, in due course."

My Lords, I read that letter as amounting to a clear notification a week before the payment was due that the respondents intended to require that payment should be made the day it was due; and the unfortunate circumstances which have been described to us by the learned counsel, and which are adverted to in the correspondence, do not and cannot do away with the rights of the respondents under the instrument.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Lord Birkenhead L.C.

It was for the appellants, having regard to the obligation into which they had entered, diligently to prepare themselves to carry out their duty timeously, and they should not have left themselves at the mercy of the disabling misadventures which are described in the letter in question.

My Lords, I do not think it necessary to deal with the third point which was ultimately abandoned by Mr. Schwabe as it was abandoned in the Courts below. I have only to add that even if it be true that the attitude of the respondents has resulted in a harsh and difficult situation for the appellants, that circumstance cannot produce any effect when once a clear view is reached upon the legal situation. In my view the pursuers here are entitled to succeed, the interlocutor delivered on appeal was right and ought to be affirmed, and I move your Lordships accordingly.

VISCOUNT FINLAY. I am of the same opinion and upon the same grounds. The bond provided for payment of interest at 5 per cent. by equal quarterly payments on February 1, May 1, August 1 and November 1 in each year. The back letter provided by its third article that notwithstanding the specification of 5 per cent. as the rate of interest which the loan was to bear according to the bond, "the lenders agree to modify the rate to 4*l.* per centum per annum, provided and so long as punctual payment shall be made of interest at said lower rate." The interest fell due on August 1; it was not sent until August 7. Various reasons are given for the delay, which I have no doubt are perfectly true. It appears that one of the trustees was travelling about and there was some delay in the cheque's getting her signature. These reasons afford no justification for not observing the terms of the contract between the parties; there was indeed nothing whatever to prevent the agents paying the money by their own cheque and then being recouped when the trustees were able to send the necessary signature.

It was contended that payment on August 7 might be considered punctual payment on August 1. I am totally unable

to take that view. If I rightly understood Mr. Watson he admitted that if the words had been that there should be payment on August 1 he would not contend—he could not contend—that they were satisfied; but that the words "*punctual* payment on the 1st of August" in some way qualified the provision for "payment on the 1st of August." "Punctual payment," he said, was not an expression really applicable in any strict sense to payment on a day; it was applicable only to payment at a particular point of time in the course of a day. It appears to me that the expression "punctual payment" is perfectly applicable to a provision for payment on a particular day, and that then it emphasizes the necessity of payment being made on that day, and not on a subsequent day. Instead of diluting the meaning of the provision for payment on that day it emphasizes it. It appears to me therefore that it is perfectly clear that there was not punctual payment on August 1 in terms of the provision in the contract as contained in the back letter as well as in the bond.

The second point, my Lords, is a totally different point and has given me more ground for consideration than I think was necessary with regard to so obvious a question of construction as arose on the first point. It is this: Whether there was anything in the nature and course of conduct which would prevent the creditors from insisting on their right to have payment at the higher rate of interest because the payment was not made for a few days after the day stipulated. The principle in such matters is most admirably laid down by Lord Glenlee in 1828 in a case which has been cited—the case of *Paterson* v. *Tod.* (1) Lord Glenlee says this: "This loan is certainly so qualified, that Paterson might have given notice, that if the interest was not paid on the term-day, he would call it up. But his conduct led the borrower to expect that it was not to be demanded strictly on the term-day. He might, however, at any time have said, 'You must now pay me the interest on the term-day, or I will call the money up.' But as his own

(1) 6 S. 1062, 1064.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Viscount Finlay.

conduct gave reason to believe that a day or two's delay would be considered sufficiently regular payment, as on the former occasions, although his having formerly passed over the irregularity was no ground to bind him in future, still it prevents him from going back and taking advantage of failures before warning."

My Lords, the question in the present case is whether there was such conduct on the part of the creditors as to bring the debtors within that principle. My Lords, I have come to the conclusion that, although there may be great hardship in enforcing the strict rights of the parties in this particular case, it is much better that these rights should be enforced, even although there is hardship in the individual case, than that the principle should be trenched upon, as infringement of it might lead to confusion in law and possible hardship and difficulty in other cases.

Now, do the defenders bring themselves within the principle of that case? The whole foundation for the argument on this part of the case rests upon the letters. The first is the letter of April 29, which has been read more than once already, and which concludes with the notice "that unless the interest be in future regularly and punctually paid, interest at the rate (5 per cent.) stipulated in the bonds will be exacted." That letter was written on April 29 and certain interest fell due on May 1, within two days after the date of that letter. On May 1 this answer comes: "We are in receipt of your letter of 29th ulto. The delay in remitting has arisen, we understand, from the factor being away from home for the last fortnight, but he has now returned and we hope to have cheque immediately." That was given by way of apology for delay, and a settlement took place by payment of the 1st of February interest and the 1st of May interest on May 13. It appears to me that acceptance of one payment under these circumstances is a foundation altogether inadequate to sustain the inference of any course of dealing between the parties which the defenders would need to establish in order to bring themselves within the doctrine enunciated by Lord Glenlee.

Then comes the letter of July 24, which is a bald intimation that certain interest will be due on August 1 and stating that the writers would "be glad to receive a remittance for the amount of the interest, less tax, in due course." Then occurred the delays to which I have already referred. Under these circumstances, my Lords, it appears to me that there is no ground whatever for alleging that there was any course of dealing which would modify the contract or that the defenders were in any way misled by the actings of the creditors into not paying with punctuality.

It follows, my Lords, that the consequences which the contract between the parties prescribed as ensuing on a failure to make punctual payment at the stipulated day must ensue.

LORD DUNEDIN. My Lords, I concur with all that has been said by the noble and learned Lord on the Woolsack. I desire particularly to associate myself with that portion of his speech in which he pointed out that the use of the word "punctual" connoted an added stress, not a relaxation of the duty of timeous payment.

As regards the second point I confess I think the case a hard one, but I think the pursuers are within their rights, and that they neither did nor said anything that was sufficient to found a plea of Bar.

LORD ATKINSON. My Lords, I too concur with the observations which have been made by my noble and learned friend on the Woolsack.

It is not contended that the language used in the two documents with which this House is conversant have other than their ordinary meaning, and it appears to me to be beyond doubt that when in an instrument two days are specifically fixed for payment of money, the provision that the payment shall be punctually made necessarily means that it shall be made on those named days, and really gives force and stringency to the provision fixing those days for payment.

H. L. (Sc.) 1920 MACLAINE v. GATTY. Lord Atkinson.

My Lords, as to the second point it appears to me that whatever may have been the practice of these parties before April 29, upon that day there was, as it were, a new departure and an intimation was given by the writers that henceforth the persons on whose behalf the letter was written would stand upon their legal rights and insist upon punctual payment. They had a perfect right to do that. It is established by the cases which have been cited that whatever may have been their previous practice it was competent for them to change their method of dealing and to assert that henceforth they would act upon their strict rights.

Now the question is, have they abandoned the position they took up upon April 29 ? The letter of July most certainly does not amount to an abandonment of it ; on the contrary, it is rather an insistence on the right asserted by the previous letter ; and therefore the only dealing that can be relied upon as abandoning the position they took up in April is the transaction which culminated on May 13. Now what was that ? They asked to be paid the interest due upon May 1, and excuse is made by the appellants on May 1 that owing to the absence of their factor that demand could not be at once complied with. The payment was ultimately made, I presume, when the factor returned on May 13.

My Lords, it appears to me to be perfectly impossible to construe that transaction as a departure in any way from the assertion of their legal right so expressly made in the letter of April 29.

I do not think, if one is permitted to say it, that the conduct of Sir Stephen Gatty is very commendable, but at all events he cannot be deprived of his legal rights although one may not be disposed altogether to admire the course he has taken.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. Stated in a sentence, this two-handed bargain, combining a back letter with a bond and disposition in security, may be

put thus : On condition that interest at 4 per cent. is punctually paid, then (1.) that will be accepted in full satisfaction of interest at the larger rate of 5 per cent. in the bond ; and (2.) the loan shall be continued for the long period of fourteen years.

As regards the construction put by Mr. Watson upon the words "punctually paid," I confess to your Lordships that I have a difficulty in understanding what the point is. He pled, and pled briefly but strenuously, in favour of a principle of elasticity—elasticity, that is to say, in the construction of a contract which provides for punctuality.

My Lords, my mind cannot comprehend the elasticity of punctuality. I know of no method of construction of a contract by way of contradiction of it.

Further, my Lords, once you introduce into a matter of construction of such an agreement questions of circumstances, of motive, of ability or inability to pay, or of shortness or length of delay—once you do that, my Lords, the terms of the bargain might vary with the view taken of these things by judges from time to time, and the whole solid contract relations of the parties might disappear. The ground of these relations may be hard, but that is better than that it should be slippery.

On the second point of argument—namely, that the conduct of the parties has barred the lenders from reverting to the term of the bond and enforcing the lenders' rights accordingly, I, of course, am not prepared to say that such a case, which might in some aspects appear to be an uphill case, is impossible—far from it. I venture to express my adoption of the view just stated to the House by my noble and learned friend on my left [Viscount Finlay], and to say that I agree with the view taken in the case of *Paterson* v. *Tod* (1) in the judgment of Lord Glenlee. In order to make a change for all the future term of the written bargain I presume that such a change would have to be reduced to writing. But it was said, and in this the argument was supported by

(1) 6 S. 1064.

H. L. (Sc.) 1920

MACLAINE v. GATTY.

Lord Shaw of Dunfermline.

Paterson v. *Tod,* that the conduct of the lenders did mislead the borrower as to what was either expected or required as for a particular impending term. It was maintained that to change the written obligation as for a particular term all you required was a course of conduct antecedent to that term. That might be so, my Lords, in a clear and continuous case. This was not such a case of clearness and continuity. The point just stated by my noble and learned friend Lord Atkinson makes that manifest. In short, punctual payment was plainly stated to be a condition which was not dispensed with at the coming term but was to be insisted upon.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 30, 1920.

Agents for the appellants: *Grahames & Co., for Hope, Todd & Kirk, W.S., Edinburgh.*

Agents for the respondents: *R. S. Taylor, Son & Humbert, for John C. Brodie & Sons, W.S., Edinburgh.*

[PRIVY COUNCIL.]

GERRARD . . . . . APPELLANT; J. C.* 1920

AND

CROWE AND ANOTHER . . . . . RESPONDENTS. *Nov.* 16.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Water—Landowner—Right to embank against Flood—Injury to Neighbour's Land.

The appellant and the respondents owned lands upon opposite sides of a river. When the river was in flood and rose higher than its bank some of the flood water used to flow over the respondents' land, ultimately finding its way back to the river. The respondents erected an embankment from a point on their land about half a mile from the river diagonally to its bank, with the object of protecting their lands behind the embankment. The water flowing over the appellant's land in time of heavy flood was thereby increased. The appellant sued the respondents for damages and an injunction. It was not proved that any flood channel was obstructed, or existed, or that there was any ancient or rightful course for the flood waters across the respondents' land:—

Held, that the action could not be maintained.

Trafford v. *The King* (1832) 8 Bing. 204 discussed.

Hurdman v. *N. E. Ry. Co.* (1878) 3 C. P. D. 168, and *Whalley* v. *L. & Y. Ry. Co.* (1884) 13 Q. B. D. 131 distinguished.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of New Zealand (April 17, 1918) reversing a judgment of the Supreme Court (June 16, 1917).

The action was brought by the appellant against the respondents in circumstances which appear from the judgment of their Lordships.

The trial judge gave judgment for 10*l.* damages and granted an injunction. The Court of Appeal reversed the decision and entered judgment for the respondents (see 18 N. Z. L. R. 323).

1920. Oct. 19, 21. *Tomlin K.C.* and *Errington* for the appellant.

Romer K.C. and *Northcote* for the respondents.

The arguments on behalf of the appellant, and the

* *Present:* VISCOUNT CAVE, LORD MOULTON, and LORD PHILLIMORE.

J. C. 1920 GERRARD v. CROWE.

authorities relied on, appear from the judgment of their Lordships; reference was also made to *Chasemore* v. *Richards*. (1) The respondents' counsel were not called upon to argue.

Nov. 16. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from an order of the Court of Appeal of New Zealand reversing a judgment of the Supreme Court in favour of the appellant, the plaintiff in the action. The question involved in the appeal is whether the respondents are liable to the appellant in damages by reason of their having constructed an embankment to protect their lands from flood.

The facts of the case, as found by Sim J. at the trial, are as follows: "The plaintiff is the owner of a farm on the east bank of the Oreti River. The defendants are the owners of certain land on the opposite bank of the river. Part of this land is intersected by a creek known as Hillend Creek, which flows into the Oreti River. Before the year 1913 when the river was in flood and rose above its banks some of the flood waters flowed over the western bank at a point on the defendant Michael Crowe's land about half a mile above the junction of the Hillend Creek with the river. The waters then flowed in a south-westerly direction across the defendants' lands, and ultimately found their way back into the river bed at some point or points further south and below the plaintiff's farm. About the end of the year 1913 the defendants erected an earthen embankment on their land. It is about 90 chains in length and about two feet in height. It begins at a point about half a mile from the western bank of the river, and runs in a southerly direction to a point close to the river bank. The object of the defendants in erecting this embankment was to prevent the flood waters spreading over their land to the west. And that has been its effect. Its effect also has been to increase the volume of water in the river opposite the plaintiff's land and thus to throw on to that land in times of heavy flood more water than otherwise would have gone there."

(1) (1859) 7 H. L. C. 349.

The plaintiff accordingly brought this action, alleging that the embankment caused his farm to be flooded to a greater extent than would otherwise have been the case, and claiming damages and a mandatory injunction to compel the defendants to remove their embankment.

The trial judge found as a fact that the plaintiff had failed to prove the existence of any flood channel such as was held to have been obstructed in *Menzies* v. *Earl Breadalbane* (1), and had also failed to prove that there was any ancient and rightful course for the flood waters of the river across the defendants' land so as to bring the case within the law as laid down by Tindal C.J. in the Exchequer Chamber in *Trafford* v. *The King* (2) and added: "It is clear, I think, from the evidence that in times of flood the waters of the river did not flow in any defined course, but simply spread over the country in a south-westerly direction and found their way back to the river at different points to the south of the plaintiff's land."

Notwithstanding these findings, the learned judge, for a reason to be hereafter noticed, gave judgment for the plaintiff; but on appeal that judgment was reversed by the Court of Appeal, who, by a majority, gave judgment for the defendants, and thereupon this appeal was brought.

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson* v. *Farquharson* (3) the rule was stated as follows: "It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus."

In *Rex* v. *Commissioners of Sewers for Pagham* (4) it was held that owners of land exposed to the inroads of the sea have a right to erect such works as are necessary for their own

(1) (1828) 3 Bli. N. S. 414.
(2) 8 Bing. 204.
(3) (1741) Mor. 12779; see also 3 Bli. N. S. 414, 421.
(4) (1828) 8 B. & C. 355, 360.

J. C. 1920 GERRARD v. CROWE.

protection, even although they may be prejudicial to others; and Lord Tenterden expressed himself as follows: "But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. Cosens, and make a greater inroad upon it, than possibly it might otherwise have done; and that as the Commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the Commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing."

To the same effect is *Nield* v. *L. & N. W. Ry. Co.* (1); and in *Whalley* v. *L. & Y. Ry. Co.* (2) Lindley L.J. said: "It seems to me established by those cases (i.e., *Menzies* v. *Earl Breadalbane* (3) and *Nield* v. *L. & N. W. Ry. Co.* (1) that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it."

Later applications of the rule are to be found in *Greyvensteyn* v. *Hattingh* (4) and *Maxey Drainage Board* v. *G. N. Ry. Co.* (5)

It was argued on behalf of the appellants that the right of a landowner to protect himself against floods is conditioned by the maxim sic utere tuo ut alienum non laedas, and cannot be exercised if as a consequence of his operations more water flows on to his neighbour's land and thereby damage is

(1) (1874) L. R. 10 Ex. 4.
(2) 13 Q. B. D. 131, 140.
(3) 3 Bli. N. S. 414.
(4) [1911] A. C. 355.
(5) (1912) 106 L. T. 429.

caused; and reliance was placed on *Menzies* v. *Earl Breadalbane* (1), *Rex* v. *Trafford* (2) and *Trafford* v. *The King* (3), and on a dictum of Lord Chelmsford in *Bickett* v. *Morris*. (4)

To import such a condition would be directly contrary to the rule as stated in the authorities above cited and would indeed render those authorities meaningless; for it would surely have been unnecessary to invoke the authority of the Courts in order to establish the proposition that a man may erect an embankment on his own land if no damage ensues to others. But in fact the authorities cited are, in their Lordships' opinion, insufficient to support the proposition contended for. In *Menzies* v. *Earl Breadalbane* (1) there was a regular flood channel which, although dry when the river was low, became filled with water at times of flood; and it is plain that such a channel forms part of the alveus of the river and cannot be obstructed. In *Rex* v. *Trafford* (5) Lord Tenterden C.J. no doubt said that "it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another," and appears to have expressed the view that no sound distinction can be drawn between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quality has been accustomed to take at particular seasons. But on the case being removed into the Exchequer Chamber on error the above judgment was reversed and a venire de novo awarded, partly on the ground that it did not appear by the verdict that the course which the flood water had taken was the "ancient and rightful course" which it ought to take, nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. The case is not further reported; and in view of the decision in the Exchequer Chamber it cannot be relied upon as a safe authority

(1) 3 Bli. N. S. 414.
(2) (1831) 1 B. & Ad. 874.
(3) 8 Bing. 204.
(4) (1866) L. R. 1 H. L. Sc. 47, 56.
(5) 1 B. & Ad. 874, 887.

J. C. 1920 GERRARD v. CROWE.

for the contention put forward. *Bickett* v. *Morris* (1) was a case of injury to the alveus; and the sentence quoted from Lord Chelmsford's judgment does not appear to have been necessary for the decision of the case: see on this case *Orr-Ewing* v. *Colquhoun*. (2) Possibly the dicta relied upon mean no more than this, that a landowner in protecting his land from the common enemy must use reasonable care and skill and must not do more than is reasonably necessary for that purpose; but, however that may be, they cannot be held to derogate from the express decisions above referred to. In their Lordships' opinion, therefore, this contention fails.

A further point, founded on the decision of the trial judge, was taken on behalf of the appellant. It was said that the effect of the respondents' embankment, which was not erected on the bank of the river Oreti, but stood back a little distance on the respondents' property and left some fourteen acres of land unprotected, was to throw the flood water on to those fourteen acres, and accordingly that the respondents were liable for the damage caused by its escape; and in support of this contention *Hurdman* v. *N. E. Ry. Co.* (3) and *Whalley* v. *L. & Y. Ry. Co.* (4) were cited.

It would be strange if a landowner, not being liable for protecting the whole of his land against floods by raising the bank of a river, became liable by reason of the fact that he had set his embankment further back and so had left a portion of his land unprotected; and it does not appear to their Lordships that this is the law. In *Hurdman* v. *N. E. Ry. Co.* (3) the defendant had erected on his property a mound of earth, which caught the rain naturally and ordinarily falling on his own land and discharged it on to the land of his neighbour. In *Whalley* v. *L. & Y. Ry. Co.* (4) the defendants had allowed a pool of water to accumulate on their property, and had subsequently taken active steps to discharge it onto the plaintiff's property. In the present case the defendants neither accumulate water on their own land nor discharge it

(1) L. R. 1 H. L. Sc. 47.
(2) (1877) 2 App. Cas. 839, 845, 853.
(3) 3 C. P. D. 168.
(4) 13 Q. B. D. 131.

by active steps on to the plaintiff's land. It is the river—the "common enemy"—which first floods the fourteen acres and then carries away the flood; and the injury to the plaintiff is not increased, but is probably diminished, by the fact that the fourteen acres are left open and unembanked. There is, in fact, neither injuria nor damnum proved under this head. This contention, therefore, also fails.

J. C. 1920 GERRARD v. CROWE.

For the above reasons their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Collyer-Bristow & Co.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND OTHERS. } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ANOTHER . . . . . } RESPONDENTS.

J. C.* 1920 Nov. 23.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Lands appropriated to Indians—Dominion or Provincial Title—13 & 14 Vict. (Can.), c. 42, ss. 1, 2—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 109—Sale of Crown Property by Sheriff—Title of Purchaser—Code of Civil Procedure, arts. 399, 2213.

The title to lands in the Province of Quebec appropriated for the use of Indians, pursuant to 14 & 15 Vict. (Can.), c. 106, and surrendered to the Crown in 1882, passed to the Province under s. 109 of the B. N. A. Act, 1867. The effect of 13 & 14 Vict. (Can.), c. 42, was not to give the Indians an equitable estate in the lands; the title remained in the Crown, the Commissioner for Indian Lands being given such an interest

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, and MR. JUSTICE DUFF.

J. C.

1920

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

as to enable him to exercise the powers of management committed to him by that statute.

St. Catherine's Milling and Lumber Co. v. *The Queen* (1888) 14 App. Cas. 46 followed and applied.

Arts. 399 and 2213 of the Code of Civil Procedure of Quebec have not the effect of conferring upon the purchasers at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

Commissaire d'Ecole v. *Price* (1895) 1 Rev. de Jur. 122 approved.

Judgment of the Court of King's Bench reversed.

APPEAL from a judgment (November 7, 1917) of the Court of King's Bench for Quebec, Appeal Side, affirming a judgment of the Superior Court.

The main question in the appeal was whether the title to lands in the Province of Quebec appropriated in 1853 for the use of Indians under 14 & 15 Vict. (Can.), c. 106, and surrendered to the Crown in 1882, was in the Crown in the right of the Dominion or in the right of the Province of Quebec.

The question arose in an action brought in the Superior Court by the second party appellant, the Star Chrome Mining Co., Ld., against the second respondent, Dame Thompson. The Attorneys-General for the Dominion and for the Province intervened in the action.

There was a subsidiary question—namely, whether respondent Dame Thompson's title was in any case validated by the fact that she had purchased the property upon a sale in execution by the sheriff.

The facts of the case and the material enactments appear from the judgment.

The trial judge (Lafontaine J.) dismissed the action and the intervention of the Attorney-General for the Province. On appeal the Court of King's Bench, Appeal Side (Cross, Carroll, Pelletier, and Roy JJ.; Lavergne J. dissenting), affirmed the decision of the trial judge.

July 29, 30, 1920. *Geoffrion K.C.* (*Lanctot K.C.* and *G. Lawrence* with him) for the appellant, the Attorney-General for Quebec. The lands reserved for Indians in the Province of Quebec became the property of the Province at confederation by virtue of s. 109 of the British North America Act,

1867; they were lands vested in the Crown at confederation subject to "an interest other than that of the Province" within the meaning of that section. The present case is not distinguishable from *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), in which it was held that lands reserved for Indians in Ontario vested in that Province. The Acts of the Parliament of Canada as to Indian reserves in Lower Canada—namely, 13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106—granted no rights other than usufructuary rights to the Indians. The Dominion of Canada had power to accept a surrender to the Crown of the Indians' rights, but had no power to take away from the Province the property in the lands assigned to the Province by the British North America Act. [Reference was made also to *Ontario Mining Co.* v. *Seybold* (2), *Attorney-General for Canada* v. *Attorney-General for Ontario* (3), and *Dominion of Canada* v. *Province of Ontario.* (4)]

St. Germain K.C. for the appellant company.

Sir John Simon K.C. and *Newcombe K.C.* (*James Wylie* with them) for the respondent, the Attorney-General for Canada. This case is distinguishable from *St. Catherine's Milling and Lumber Co.* v. *The Queen.* (1) As a result of 13 & 14 Vict. (Can.), c. 42, and 14 & 15 Vict. (Can.), c. 106, the position before and at the time of the passing of the British North America Act, 1867, was that lands reserved for Indians in Lower Canada were vested in the Commissioner on behalf of the Indians, and were not vested in the Crown. The Commissioner had all the rights of ownership, including a power of sale conditional upon the consent of the Indians. The Acts of the Parliament of Canada relative to Indian reserves in Upper Canada contained no similar provisions. Sect. 26 of 31 Vict. (Dom.), c. 42, provided that thenceforth the land should vest in the Crown; it therefore cannot be said that it vested earlier. As the effect of ss. 12, 65, and 130 of the British North America Act, 1867, the Commissioner became a Dominion official, and under s. 91, head 24 ("Indians, and land reserved for Indians"), the Dominion Legislature had

(1) 14 App. Cas. 46.
(2) [1903] A. C. 73.
(3) [1898] A. C. 700.
(4) [1910] A. C. 637.

J. C. 1920 ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

exclusive power to pass laws relative to the sale of the lands, and the application of the proceeds, as was done by 31 Vict. c. 42. The surrender in 1882, unlike that in the *St. Catherine's Case* (1), was merely for the purpose of sale and for the purchase of other lands. Upon the surrender the lands became the unencumbered property of the Dominion with a full right of disposition, subject only to the obligation to apply the proceeds in the manner provided by the terms of the surrender.

St. Jacques K.C. for the respondent, Dame Thompson.

Geoffrion K.C. in reply. The title of the Indians in Quebec was no higher than the title under the proclamation of October 7, 1763, under which the lands were merely "set apart for the use of the Indians." Under s. 3 of 13 & 14 Vict. (Can.), c. 42, there was no restriction in the power of the Governor to deal with the lands; the Commissioner was merely a servant of the Government. If any transferable right was granted to the Indians, it was merely the right of use; there was no right to convert the lands into money. If the title of the Indians in Quebec was the same as in Ontario, the Dominion Government could not arrive at a different result in Quebec by dealing with the lands differently.

Nov. 23. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. By an order of the Governor of the late Province of Canada in Council, of August 9, 1853, pursuant to a statute of that Province (14 & 15 Vict. c. 106), the provisions of which are hereinafter explained, certain lands, including those whose title is in question on this appeal —namely, lots 6, 7 and 8, in the thirteenth range of the township of Coleraine in the county of Megantic—were appropriated for the benefit of the Indian tribes of Lower Canada, those particularly mentioned being set apart for the tribe called the Abenakis of Becancour. By an instrument of surrender of February 14, 1882, which was accepted by an order of the Governor-General of Canada in Council of April 3, 1882, this tribe surrendered (inter alia) the lots

(1) 14 App. Cas. 46.

above specified to Her Majesty the Queen; and on July 2, 1887, the Dominion Government professed to grant them by letters patent to Cyrice Tetu, of Montreal, whose interest in them passed on his death to Dame Caroline Tetu.

On April 10, 1893, the lands in question, having been seized in execution by the sheriff of the district of Arthabaska, under a judgment against Dame Caroline Tetu, were sold by the sheriff to one Joseph Lamarche, whose title was eventually acquired by the respondent Dame Rosalie Thompson. The appellants, the Star Chrome Mining Co., Ld., having purchased the property from the respondent Dame Rosalie Thompson, in February, 1907, the company took proceedings against the vendor, claiming rescission of the sale and demanding repayment of the purchase money with damages, on the ground that the property was in the Crown in the right of the Province of Quebec, and that the vendor was consequently without title at the time of the sale.

The action of the appellants having come on for trial on June 4, 1909, the trial was adjourned, and on June 29, 1912, an order was made suggesting that the Dominion Government and the Government of Quebec should intervene for the purpose of determining the controversy touching the authority of the Dominion Government to dispose of the lands in question on behalf of the Crown. On October 2, 1914, the appellant, the Attorney-General of Quebec, intervened, claiming by his intervention that the grant to Cyrice Tetu, of July 2, 1887, was null and void, on the ground that the lands which the grant professed to dispose of were the property of the Crown in the right of Quebec; and on October 7, 1914, the respondent, the Attorney-General of Canada, met the intervention of the Attorney-General of Quebec by a contestation in which he maintained the validity of the grant to Cyrice Tetu. On May 7, 1917, the Superior Court pronounced judgment rejecting the intervention of the Attorney-General of Quebec, and the appeal from this judgment was dismissed by the Court of King's Bench on November 20, 1917, Lavergne J. dissenting.

The first question which arises concerns the effect of the

J. C. 1920

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

deed of surrender of April 3, 1882—whether, that is to say, as a result of the surrender, the title to the lands affected by it became vested in the Crown in right of the Dominion, or, on the contrary, the title, freed from the burden of the Indian interest, passed to the Province under s. 109 of the British North America Act.

The claim of Quebec is based upon the contention that at the date of Confederation the radical title in these lands was vested in the Crown, subject to an interest held in trust for the benefit of the Indians, which, in the words used by Lord Watson, in delivering judgment in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), was only "a personal and usufructuary right dependent upon the goodwill of the Sovereign." On behalf of the Dominion it is contended that the title, both legal and beneficial, was held in trust for the Indians.

In virtue of the enactment of s. 91, head 24, of the British North America Act, by which exclusive authority to legislate in respect of lands reserved for Indians is vested in the Dominion Parliament, it is not disputed that that Parliament would have full authority to legislate in respect of the disposition of the Indian title, which, according to the Dominion's contention, would be the full beneficial title. On the other hand, if the view advanced by the Province touching the nature of the Indian title be accepted, then it follows from the principle laid down by the decision of this Board in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (supra) (1) that upon the surrender in 1882 of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest.

The answer to the question raised by this controversy primarily depends upon the true construction of two statutes passed by the Legislature of the Province of Canada in 1850 and 1851 (13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106). The last-mentioned statute is entitled, "An Act to authorise the setting apart of lands for the use of certain Indian tribes in

(1) 14 App. Cas. 46, 54.

Lower Canada," and, after reciting that it is expedient to set apart certain lands for such " use, " it enacts that tracts not exceeding 230,000 acres may, under the authority of Orders in Council, be described, surveyed and set out by the Commissioner of Crown Lands, and that " such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart . . . . and the said tracts of land shall accordingly, by virtue of this Act . . . . be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under" the statute first mentioned, 13 & 14 Vict. c. 42.

This statute (13 & 14 Vict. c. 42) is entitled " An Act for the better protection of the lands and property of the Indians in Lower Canada," and, following upon a recital that it is expedient to make better provision in respect of " lands appropriated to the use of Indians in Lower Canada," enacts (by s. 1) as follows : " That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested, in trust for such tribe or body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common, or by any chief or member thereof or other party for the use or benefit of such tribe or body, and shall be entitled to receive and recover the rents, issues and profits of such lands and property, and shall and may, in and by the name aforesaid, but subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property." And by s. 3 : " That the said Commissioner shall have full power to concede or lease or charge any such land or property as aforesaid and to receive or recover the rents, issues and profits thereof as any lawful proprietor, possessor or occupant thereof might do, but shall

J. C.
1920
ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

be subject in all things to the instructions he may from time to time receive from the Governor, and shall be personally responsible to the Crown for all his acts, and more especially for any act done contrary to such instructions, and shall account for all moneys received by him, and apply and pay over the same in such manner, at such times, and to such person or officer, as shall be appointed by the Governor, and shall report from time to time on all matters relative to this office in such manner and form, and give such security, as the Governor shall direct and require; and all moneys and movable property received by him or in his possession as Commissioner, if not duly accounted for, applied and paid over as aforesaid, or if not delivered by any person having been such Commissioner to his successor in office, may be recovered by the Crown or by such successor, in any Court having civil jurisdiction to the amount or value, from the person having been such Commissioner and his sureties, jointly and severally."

The rival views which have been advanced before their Lordships touching the construction of these enactments have already been indicated.

In support of the Dominion claim it is urged that, as regards lands "appropriated" under the Act of 1851, the words "shall be and are hereby vested in trust for" the Indians, create a beneficial estate in such lands, which by force of the statute is held for the Indians, and which could not lawfully be devoted to any purpose other than the purposes of the trust, and indeed is equivalent to the beneficial ownership.

While the language of the statute of 1850 undoubtedly imports a legislative acknowledgment of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.

By s. 3 the Commissioner is not only accountable for his

acts, but is subject to the direction of the Governor in all matters relating to the trust; the intent of the statute appears to be, in other words, that the rights and powers committed to him are not committed to him as the delegate of the Legislature, but as the officer who for convenience of administration is appointed to represent the Crown for the purpose of managing the property for the benefit of the Indians. If this be the correct view, then, whatever be the nature or quantum of the Commissioner's interest, it is held by him in his capacity of officer of the Crown and his title is still the title of the Crown; and this, it may be observed, is apparently the view upon which the Dominion Government proceeded in accepting the surrender of 1882, the lands surrendered being treated (and their Lordships think rightly treated) for the purposes of that transaction as a "Reserve" within the meaning of the Act of 1882—in other words, as lands "the legal title" to which still remained in the Crown (s. 2, sub-s. 6). It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively: *Tunbridge Wells Corporation* v. *Baird* (1), an interest which may become devested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from s. 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.

In the judgment of this Board in the *St. Catherine's Milling Co.'s Case* (2), already referred to, it was laid down, speaking of Crown lands burdened with the Indian interest arising under the Proclamation of 1763, as follows: "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded

(1) [1896] A. C. 434. (2) 14 App. Cas. 46, 55, 58.

J. C. 1920

ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

territory was, at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of s. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." And their Lordships said: "It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

The language of the statutes of 1850 and 1851 must, therefore, be examined in light of the circumstances of the time and of the objects of the legislation as declared by the enactments themselves, for the purpose of ascertaining whether or not the Crown retained in lands appropriated for the use of an Indian tribe a "paramount title" upon which the Indian interest was a mere "burden" in the sense in which these phrases are used in these passages.

The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that Proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, "a personal and

usufructuary right dependent upon the good-will of the Sovereign." It should be noted also that the Act of 1851, under which the lands in question were set apart, is plainly an Act passed with the object of setting lands apart "for the use" of Indian tribes, and that by the same Act the powers of the Commissioner of Indian Lands under the Act of 1850 are referred to as "powers of management."

Their Lordships do not find it necessary to enter upon a consideration of the precise effect of the words of s. 3, investing the Commissioner with power to "concede," "lease" or "charge" lands or property affected by the statute. It is sufficient to say that, having regard to the recitals of the same statute and the language of the Act of 1851 just referred to, as well as to the policy of successive administrations in the matter of Indian affairs which, to cite the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (1) had been "all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified at a meeting of their chiefs or head men convened for the purpose," their Lordships think these words ought not to be construed as giving the Commissioner authority to convert the Indian interest into money by sale or to dispose of the land freed from the burden of the Indian interest, except after a surrender of that interest to the Crown.

It results from these considerations, in their Lordships' opinion, that the effect of the Act of 1850 is not to create an equitable estate in lands set apart for an Indian tribe of which the Commissioner is made the recipient for the benefit of the Indians, but that the title remains in the Crown and that the Commissioner is given such an interest as will enable him to exercise the powers of management and administration committed to him by the statute.

The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the

(1) 14 App. Cas. 46.

J. C. 1920 — ATTORNEY-GENERAL FOR QUEBEC v. ATTORNEY-GENERAL FOR CANADA.

Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (1), it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867." The effect of the surrender would have been otherwise if the view, which no doubt was the view upon which the Dominion Government acted, had prevailed—namely, that the beneficial title in the lands was by the Act of 1850 vested in the Commissioner of Indian Lands as trustee for the Indians, with authority, subject to the superintendence of the Crown, to convert the Indian interest into money for the benefit of the Indians. As already indicated, in their Lordships' opinion, that is a view of the Act of 1850 which cannot be sustained.

One further point remains. On behalf of the respondent Dame Rosalie Thompson it is contended that her title is validated by reason of the adjudication of the sheriff's sale. Their Lordships concur in the view which prevailed in *Les Commissaires d'Ecoles de Saint Alexis* v. *Price* (2), that arts. 399 and 2213 of the Code of Civil Procedure have not the effect of conferring upon the purchaser at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

The appeal should, therefore, be allowed and the action remitted to the Superior Court to give judgment against the respondent Dame Rosalie Thompson for the amount of the purchase money and of the damages which, if any, she shall be found liable to pay to the appellants, the Star Chrome Mining Co., and their Lordships will humbly advise His Majesty accordingly.

The respondent Dame Rosalie Thompson will pay the costs of the Star Chrome Mining Co. here and in the Courts below. There will be no order as to the costs of other parties.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Charles Russell & Co. ; Witham Roskell, Munster & Weld.*

(1) 14 App. Cas. 54. (2) 1 Rev. de Jur. 122.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR CANADA . APPELLANT ;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC . . . } . RESPONDENT.

J. C.*
1920
Nov. 30.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Tidal Water Fisheries—Power of Province to grant exclusive Licences—Right of Public—Regulative Power of Dominion—29 Vict. (Can.), c. 11, ss. 3, 6—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91, head 12.

Having regard to the public right of fishing declared by 29 Vict. (Can.) c. 11, s. 6, and previous enactments having force in the Province of Quebec, the Government of that Province has not power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits, or arms of the sea of the Province and of the high sea washing its coasts ; nor has the Legislature of the Province power to authorize the Government to do so. In so far as the soil is vested in the Crown in the right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing of private persons without the aid of engines.

Sect. 3 of 29 Vict. (Can.) c. 11, which empowered the Commissioner of Crown Lands to issue fishing leases, must be read with s. 6, which maintains the right of the public. The power no longer exists in its entirety, so far as it was regulative it passed to the Dominion under the British North America Act, 1867, s. 91, head 12. The Dominion power of regulation must be exercised so as not to deprive the Province or private persons of proprietary rights which they possess.

Attorney-General for British Columbia v. *Attorney-General for Canada* [1914] A. C. 153 applied.

Judgment of Court of King's Bench reversed.

APPEAL from a judgment (February 7, 1917) of the Court of King's Bench for the Province of Quebec upon questions submitted to that Court by the Lieutenant-Governor under art. 579 of R. S. Queb., 1909, and the amendments thereto.

The questions submitted related to the right of the

* *Present :* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and Mr. JUSTICE DUFF.

J. C. 1920 ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

Provincial Government to grant exclusive fishing rights in the tidal waters of the Province, and are fully stated in their Lordships' judgments together with the effect of the answers given by the learned judges. The judgments in the King's Bench were by a majority in favour of the Province, and are reported at Q. R. 26 K. B. 289.

1920. July 19, 20, 22, 23; Aug. 2, 3. *Sir John Simon K.C.*, *Newcombe K.C.* (*Stuart Moore* with them) for the appellant. (1) The answer to each of the questions should have been in the negative. Questions relative to fishing rights in Canada have been considered by the Board in two cases. In the first, *Attorney-General for Canada* v. *Attorney-General for Provinces* (2), it was held that the British North America Act, 1867, s. 91, head 12, in giving to the Dominion legislative jurisdiction over fisheries did not confer a proprietary right therein, and that whatever proprietary rights were vested before confederation remained unaffected; the decision left open the question whether the proprietary right of fishing in tidal waters vested in the Provinces. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3) it was held that the right of fishing in tidal waters in British Columbia was a right of the public (whether inhabitants of the Province or not) and not a proprietary right, and that consequently the Province had no power over it, either to grant exclusive rights of fishing or otherwise. The second decision is conclusive of this case, since in Quebec there is a public right of fishing in tidal waters at common law and by statute. The contention that Quebec in this respect is in a different position from British Columbia fails. First, because, whether or not under French law there was formerly a public right of fishing in navigable waters in Quebec, the right of the public to fish in "any of the harbours or roadsteads, creeks or rivers" was affirmed before

(1) It was agreed that having regard to the observations in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1914] A. C. 153, 174, the arguments should proceed as though that part of the questions which related to the sea beyond low-water mark were omitted.

(2) [1898] A. C. 700.

(3) [1914] A. C. 153.

confederation by a long course of legislation applying to Quebec. The first of these Acts was 28 Geo. 3 (Prov. of Queb.), c. 6, which is modelled on the English legislation with regard to Newfoundland sea fisheries (see 10 & 11 Will. 3, c. 25), and was passed in pursuance of the express instruction to the Governor dated January 3, 1775: see Shortt & Doughty's Constitutional Documents, p. 486, § 36. A series of Acts similarly declaring the public right followed: (of Lower Canada) 47 Geo. 3, c. 12, 4 Geo. 4, c. 1, 9 Geo. 4, c. 42, 6 Will. 4, c. 57; (of United Canada) 4 & 5 Vict. c. 36, 20 Vict. c. 21, 29 Vict. c. 11. Sect. 6 of the last named Act is headed "Deep Sea Fisheries," and clearly applies to fishing in tidal waters. After confederation the Dominion Parliament by 31 Vict. c. 60, s. 3, while repealing (by s. 20) the last named Act, by s. 3 reaffirmed the right of the public. This Act by s. 2 replaced the power of leasing contained in 29 Vict. c. 11, s. 3, by a similar power in the Minister of Marine, omitting such part of the repealed section as trenched upon rights of property in the Province. That provision was valid under s. 91, head 12. Secondly, conceding that French law is applicable generally to rights of property in Quebec, the right of fishing in tidal waters is not a proprietary right. Further, it is at least doubtful whether the French kings had a prerogative right to grant fishing in tidal waters: see Dalloz Répertoire, "eaux" No. 4, "pêche maritime" No. 2; Valin, Ordonnance de la Marine, vol. ii., p. 691; Pothier (ed. Bugnet), vol. ix., p. 121, "propriété." But in any case that prerogative, if it existed, did not survive to the English Crown; the public right became exercisable in Quebec as in other territory under British sovereignty: per Day J. in Seigniorial Questions (Lower Canada Reports, B. 50 *e*); *Pollard* v. *Hagan*. (1) The Civil Code of Quebec by art. 567 recognizes the right of fishing as a branch of public law: see also sixth Report of Codifiers, p. 226.

The objection in the first *Fisheries Case* (2) to the power of leasing contained in s. 2 of the Dominion statute 31 Vict. c. 60 was that it extended to inland fisheries and consequently

(1) (1844) 3 Howard, 212, 225. (2) [1898] A. C. 700, 714.

J. C. 1920 ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

to property vested in the Provinces, an objection removed by R. S. Can., 1906, c. 45, s. 8. The judgment does not support the view that tidal fisheries are a proprietary right of the Provinces. The Provincial Legislature is not competent to displace the public right declared and enacted by 29 Vict. c. 11, s. 6, and cannot use any power which survived to it under s. 3 to destroy that right: *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (1) If the power of leasing in 29 Vict. c. 11, s. 3, operated to destroy the public right in Quebec it equally did so in Ontario.

Lanctot K.C. and *Geoffrion K.C.* (*G. Lawrence* with them) for the respondent. The Parliament of Canada by 29 Vict. c. 11, s. 3, recognized as existing in, and granted to, the Crown the power to issue exclusive leases in respect of fishing in Upper and Lower Canada. That power, which could be exercised as to tidal waters, existed at the union in 1867, and passed by the British North America Act to the Provinces concerned, either as a "royalty" or a proprietary right under ss. 109 and 117, or by a transference to the Lieutenant-Governor under ss. 12 and 65, unless there was, as in British Columbia, such a right of the public to fish in tidal waters as was incompatible with the exercise of the powers to lease. In Quebec the right of fishing was never subject to the English common law; under French law no public right of fishing existed. The French kings frequently granted exclusive rights of fishing in tidal waters in Quebec; those grants have been upheld by a series of decisions in Quebec, and are recognized as valid by the series of Acts referred to by the appellant. The views of Valin and Dalloz on this question are not applicable in Quebec, because they are based upon the Ordonnance de la Marine of 1681, which was not registered in Quebec, and consequently was not effectual there. If there was any public right of fishing in tidal waters in Quebec it was not, as in British Columbia, a right which was destructive of the right of the Crown. As in the case of lands reserved for the use of Indians, it was

(1) [1896] A. C. 348, 362, 363.

merely a burden upon the Crown's title; the title of the Crown so burdened passed to the Province: *St. Catherine's Milling and Lumber Co.* v. *The Queen.* (1) The right of the public under s. 6 of the Act of 1865 is expressly declared to be subject to the right to lease given by s. 3. The latter right cannot be treated as merely a matter of regulation, for s. 4 expressly gives a right to make regulations, and treats the power to lease as a power different from the right to regulate. Sect. 17 treats persons other than lessees fishing in leased areas as trespassers. The right to lease was a right for revenue purposes, and was reserved to the Province in 1867 as a proprietary right. The residual legislative power as to proprietary rights is in the Provinces, the onus is therefore on the appellant. It is conceded that under s. 91, head 12, of the British North America Act, 1867, the Dominion may make regulations which are burdensome to the lessees from the Province. In any case the questions should be answered in favour of the Province so far as they relate to "engines fixed to the soil."

Sir John Simon K.C. in reply. Whether or not the rights of the Crown with regard to fishing in tidal waters in Quebec differed in character from those in British Columbia there was in each Province a public right of fishing. If there was a public right then the judgment in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) is conclusive whatever power of leasing may have existed. The right to lease was merely regulative. In England the public right exists although the authorities under the power of regulation have power to, and do, prohibit fishing in certain areas. The power of leasing in 29 Vict. c. 11, s. 3, cannot be read as excluding the public right having regard to the express language in which that right is declared by s. 6. The public right is not qualified by s. 3, though its exercise may be limited by such leases as were validly granted under the section. With regard to the old French law a Réglement of 1717 (3), which was registered in Quebec, applied the Ordonnance de la Marine

(1) (1888) 14 App. Cas. 46. (2) [1914] A. C. 153, 175.
(3) Edits, Ordonnances, royaux, etc. (Quebec, 1854), p. 358.

J. C. 1920 ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

to the French colonies. Valin shows that the boundary of sea-fishing, to which alone the Ordonnance applied, extended as far as the tidal flow. With regard to "engines fixed to the soil," the matter falls within s. 91, head 12.

Nov. 30. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The controversy in this case arises over the answers to certain questions relating to the right of fishing in the tidal waters of the Province of Quebec. These questions were submitted to the Court of King's Bench of the Province by the Lieutenant-Governor in Council, who so submitted them under authority conferred on him by a statute of Quebec.

The questions were these: 1. Has the Government of the Province of Quebec, or a member of the Executive Council of the Province, power to grant the exclusive right of fishing, either by means of engines fixed to the soil, or in any other manner, in the tidal waters of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province, and of the high seas washing its coasts, to a distance of three marine miles from the shore: (*a*) between high-water mark and low-water mark; (*b*) beyond low-water mark, and if in the affirmative, to what extent?

2. Can the Legislature of the Province authorize the Government of the Province, or a member of the Executive Council of the Province or any other person, to grant the exclusive rights of fishing set forth in the preceding question.

3. If there existed heretofore, or if there still exist, restrictions upon the granting of exclusive rights of fishing in the tidal waters as aforesaid, and if such restrictions have been or are abolished, are the fisheries in such waters, after such abolition, the property of the Province, and has the Legislature or the Government of the Province, or a Minister of the Government, or any other person the powers mentioned in the preceding question with regard to these fisheries?

The learned judges of the Court of King's Bench of Quebec, by a majority consisting of the Chief Justice (Sir Horace

Archambeault), Trenholme, Lavergne and Carroll JJ. answered all these questions in the affirmative. The Chief Justice, however, so answered the first question subject to a reservation as regards waters beyond low-water mark out to the three-mile limit, regarding which he was of opinion, following an expression of view by their Lordships in a previous case, that no deliverance on a subject which was one of international law, ought under the circumstances to be made. He inserted a similar qualification into his answer to the third question. Cross J., who also heard the case, dissented as to the general principle laid down by his colleagues, expressing an opinion in the negative on the two first questions, and treating the third question as consequently not arising.

The questions thus raised relate to the Province of Quebec, where the common law is based on that of France, and it is the circumstance that the common law of the Province is different from that which obtains in the rest of Canada that gives rise to a distinction which has to be kept in mind. If the common law of Great Britain had obtained, the points that have arisen would have been covered in some measure by their Lordships' decision in the appeal from British Columbia: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), which applied principles previously laid down by the Board in *Attorney-General for Canada* v. *Attorneys-General for Provinces.* (2) It is accordingly desirable before proceeding further to refer to the principles which were laid down in the appeals in these two cases.

The decision of 1898 was concerned with a number of questions between the Dominion and the Provinces relating to rights of property and to legislative jurisdiction. It was pointed out that the proprietary right in the solum of Canada was vested in the Crown, whether the legislative and executive control is with the Dominion or with the Province, and that there is no presumption because legislative jurisdiction has been conferred on the Dominion that therefore a proprietary title has been conferred on it. What the Board on that

(1) [1914] A. C. 153. (2) [1898] A. C. 700.

J. C.
1920
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

occasion had to determine was, among other things, whether the beds of rivers and other waters situate within the territorial limits of a Province and not granted before confederation, belonged to the Crown in right of the Dominion or of the Province. The answer was that, generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial. It followed that the fishing rights, so far as they depended on property, were likewise provincial. But to the Dominion had been given by s. 91 of the British North America Act, 1867, exclusive legislative jurisdiction over sea coast and inland fisheries. This power to legislate was so sweeping in its terms that it could extend to what practically might be a modification of the character of the proprietary title of a Province, and it was not possible to lay down in abstract terms a priori a limit to this power of legislation. All that Lord Herschell could say in delivering their Lordships' opinion was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by s. 91 extended to regulation only, however far regulation might proceed. It included the capacity to impose taxes for licences to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant. It was added that the enactment of fishery regulations and restrictions was within the exclusive competence of the Dominion Parliament, and was therefore not within the legislative power of any Province, although that Province might well have power, under the capacity that belonged to it under s. 92, to deal with property and civil rights within the Province, to pass statutes relating to modes of conveyance, or prescribing the terms and conditions upon which the fisheries that were the property of the Province might be granted, leased, or otherwise disposed of, or relating to succession to a provincial fishing right; for

such legislation would be concerned only with the proprietary title.

In the appeal decided in 1914: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), the principles laid down in the judgment of 1898 were further developed in their application. It was held that it was not competent for the Legislature of British Columbia to authorize the Government of the Province to grant exclusive rights of fishing in tidal rivers or in the sea, including arms of the sea and estuaries of rivers. It was laid down that in the sea, wherever the common law of England applies, the right of fishing is a public right, not dependent on a proprietary title, and that consequently the regulation of the right must rest exclusively with the Dominion Parliament. In the case of an inland lake or river, or other non-tidal water, where the solum is vested in a private owner or the Crown, the public in British Columbia have no such right. The fisheries are mere profits of the soil over which the water flows, and the title to fish follows the title to the solum, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit a prendre in alieno solo. With such inland fisheries it is of course only by way of regulation that the Dominion Parliament can interfere. Their Lordships were chiefly concerned in the decision under discussion with the right of fishing in tidal waters and in the sea. So far as these waters were concerned, the right of fishing in them was by English law a public and not a proprietary right, and was accordingly held to be subject to regulation by the Dominion Parliament only. So far as concerned waters which were navigable but non-tidal no question arose; for, as English law governed, the fishing in navigable non-tidal waters was the subject of property, and there was no right in the public generally to fish in them. As to the sea between low-water mark and the three-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed ou that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not

(1) [1914] A. C. 153.

J. C. 1920 ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only.

Whatever the origin and character of the title of the public to fish in tidal waters, that title had, as their Lordships observed, been made unalterable, except by a Legislature possessing competent authority, since Magna Charta. And as Magna Charta had come to form part of the common law of England, it was part of the law of British Columbia. In speaking of the public right of fishing in tidal waters, their Lordships were careful to point out that they did not refer to fishing by way of kiddles, weirs, or other engines fixed to the soil. For such methods of fishing involved a use of the solum which, according to English law, cannot be vested in the public, but must belong to the Crown or to a private owner. They added that the question whether non-tidal waters were navigable or not did not bear on the question they had to decide; for the fishing in non-tidal navigable waters was the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally. They held that, because the right of fishing in the sea is a right of the public generally which does not depend on any proprietary title, the Dominion must have the exclusive right of legislation with regard to it as such, and that accordingly the Province of British Columbia could not confer any exclusive or preferential right of fishing on individuals or classes of individuals.

The questions which their Lordships were called on to decide in 1914 were in certain important respects different from those now before them. In the first place, the questions then raised related to rights of fishing in British Columbia, where, as has been remarked, the common law applicable was that of England, whereas the common law applicable in Quebec is, generally speaking, the old French law, as it was introduced into the territory of the Province when it was subject to the rule of the King of France. The provisions of

Magna Charta, now the foundation of the public right wherever the common law of England prevails, could in that case have no application to Quebec. In the second place, under that old French law, it may be that the distinction was not between tidal and non-tidal waters, but between those waters that were navigable and those that were not.

But the French law applicable to the Province of Quebec, so far as concerns the right of the public to fish in the waters of the Province, has been modified by certain statutes competently passed to which reference will presently be made. Into the precise character of the old French law it will be found that these statutes render it unnecessary to enter for the purposes of the present appeal. Under the French régime the custom of Paris was in force in the Province, and the Government of French Canada was modelled on that of a province of France. If it were necessary to pursue the character of the French law from time to time applicable, it would have to be considered whether any part of the Ordinance, sometimes spoken of as the Code de la Marine of 1681, which declared all the subjects of the King of France to have the right of fishing in the sea and on its banks, was ever so registered as to become law in French Canada, a point which conceivably may still require investigation in view of materials which were brought to their Lordships' notice in the course of the argument. It might also be necessary to determine whether, on the cession of Canada to England in 1763, the French law as to the Royal prerogative was abrogated and the law of England substituted for it. Into this historical question, which is one over which there has been much controversy, it is, however, unnecessary to enter. For assuming that the right of fishing in navigable waters belonged, under French law, to the domain of the Crown, and that the public enjoyed the right of fishing in such waters only subject to the prerogative of the King of France to grant at his pleasure exclusive rights of fishing to individuals, it is plain that this state of the law was altered by local statutes passed after the cession of 1763.

In order to find the powers under which these statutes

J. C.
1920
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

were enacted, reference must be made to the relevant Acts of the Imperial Parliament. The first of these was the Quebec Act of 1774. This Act defined the boundaries of the large Province of Canada which had been called Quebec in the Royal Proclamation that followed on the cession effected by the Treaty of Paris. It then went on to declare that notwithstanding previous proclamations, commissions, ordinances, etc., in all matters of controversy relative to property and civil rights, resort was to be had to the existing laws of Canada as the rule for their decision, unless varied by ordinances passed by the Governor with the advice and consent of a Legislative Council to be set up by the Crown. The criminal law was to be that of England. The effect of the Act was thus to retain or to reintroduce the old French law wherever applicable as to property and civil rights.

In 1791, under another Act of that year, the Province of Quebec was divided into the separate Provinces of Upper and Lower Canada, and large powers of legislation were granted. The existing laws were to remain in force until altered, but power was given to the new Government to make laws for the peace, welfare and good government of their Provinces.

In 1840, by a subsequent Act, the two Provinces were united into the single Province of Canada, which remained as such until confederation in 1867. This united Province possessed representative government from the beginning, and a little later on its government was made responsible also.

Acting under the powers conferred on it, the Province of Quebec from time to time had passed laws regulative of fisheries. In 1788 a statute was enacted which declared that all the King's subjects should have the right to fish and to use the shores for that purpose over a large part of the river St. Lawrence and another river which emptied itself into the Bay of Chaleurs. The right extended to rivers, creeks, harbours and roads. This statute, in conferring the right to fish on the King's subjects generally, in the language it adopted, substantially followed the model afforded by the Newfoundland Fisheries Act of 1699, in which the policy of

encouraging the people of Great Britain to go to Newfoundland, catch fish, and dry them on the shores and bring them back, was adopted. This policy explains the stress laid in the statute on fishing in the sea and using the banks for drying, etc. It extends, however, to the right to take bait and fish in rivers, lakes, creeks, harbours and roads generally, and rights similar for the purposes of this appeal were conferred by the series of fishery statutes passed in Canada in relation to Canadian waters.

In 1807 a further statute was passed by the Government of the Province of Lower Canada under which the right to fish and land was further extended, with the saving of rivers, creeks, harbours, roads, and land which had been made private property by title derived from the King of England, or by grant prior to 1760, or by location certificate. In 1824 a similar Act was passed extending the right of the public to fish to the Inferior District of Gaspé and two named counties. Further Acts regulating the rights of fishing in the District of Gaspé were passed in 1829 and 1836, by the Legislature of Lower Canada. In 1841, after the union of Upper and Lower Canada, the right of all the King's subjects to fish in the waters of Gaspé was reaffirmed, and in 1853 the Legislature of the Province of Canada further declared the right of the King's subjects to fish to extend to the Gulf of the St. Lawrence. In 1857 an Act of the Province anew declared the right of the King's subjects to fish in all the waters and rivers of the Province, with the exception of rivers lying within the territory known as the King's Posts, as to which it was provided that the Governor in Council might grant permission to fish in these rivers. In 1858, by another statute of the Province of Canada, the general right of the King's subjects was reaffirmed; but it was provided that the Governor-General might grant special fishing leases and licences for lands belonging to the Crown, for any term not exceeding nine years, and might make such regulations as should be found necessary or expedient for the better management and regulation of the fisheries of the Province.

In 1865 the Provincial Government of the united Provinces

J. C.
1920
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

passed an Act for the amendment of the law and for the better regulation of fishing and protection of fisheries. It applied to the whole of Upper and Lower Canada without distinction between districts. By this statute the Commissioner of Crown Lands might, under s. 3, where the exclusive right of fishing did not already exist by law in favour of private persons, issue fishing leases and licences for fisheries and fishing wheresoever situated or carried on, and grant licences of occupation for public lands in connection with fisheries; but leases or licences for any term exceeding nine years were to be issued only under the authority of an order of the Governor-General in Council. By s. 4 the Governor in Council might from time to time make regulations for the better management and regulation of fisheries, to prevent the obstruction and pollution of streams, to regulate and prevent fishing, and to prohibit fishing except under leases and licences. By s. 6, which is headed "Deep Sea Fisheries," it was in the first place declared that every subject of the Sovereign might use vacant public property for the purpose of landing, salting, curing and drying fish, etc., and that: "All subjects of Her Majesty may take bait or fish in any of the harbours or roadsteads, creeks or rivers; subject always, and in every case, to the provisions of this Act as affects the leasing or licensing of fisheries and fishing stations, but no property leased or licensed shall be deemed vacant." Sect. 17 prohibits fishing in areas described in leases or licences now existing or hereafter to be granted. It, however, adds that the occupation of any fishing station or waters so leased or licensed for the express purpose of net fishing is not to interfere with the taking of bait used for cod fishing, nor prevent angling for other purposes than those of trade or commerce.

In 1867 the British North America Act was passed, and in 1868 the Dominion Parliament repealed the Act of 1865 by s. 20 of its Fisheries Act of 1868. The Act of 1865 was thus in force only for three years. Sect. 91 of the British North America Act, 1867, had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast

and inland fisheries, and it was under this authority that the repeal was effected. By the Fisheries Act of 1868 that Parliament sought to exercise its powers by enacting a number of provisions in many respects resembling those of the Act of 1865, and by further regulating the exercise of both public and private rights of fishing throughout the Dominion. The substance of this Act was incorporated into the subsequent Consolidated Statutes of Canada on the subject of fisheries. As to one of the sections, s. 4 of the then Revised Statutes of Canada, c. 95, so far as it purported to empower the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to a Province, it was held by this Board, in the case before them in 1898, that the Dominion had no power to pass it. Their Lordships think that this is now settled law.

But the decision of this point does not conclude the question before them, which is not whether the Dominion has power to grant exclusive rights of fishing in waters the property of a Province, but whether the provincial Government has power to grant such an exclusive right of fishing in tidal waters. When the Act of 1865 was passed, the Government of the united Provinces of Upper and Lower Canada could unquestionably confer on itself the capacity to do this. For it had full power to make laws for the peace, order, and good government of the Provinces without any such restrictions as affected the right of a Province under the British North America Act, 1867, and it could consequently abrogate the fishing rights not only of private persons but of the public. After confederation, neither the Dominion nor any Province possessed this power in its integrity. The Dominion Parliament, having exclusive jurisdiction over sea coast and inland fisheries, could regulate the exercise of all fishing rights, private and public alike. As the public right was not proprietary, the Dominion Parliament has in effect exclusive jurisdiction to deal with it. But as to private rights, the provincial Legislature has exclusive jurisdiction so long as these present no other aspects than that of property and civil rights in the Province, or of matter

J. C. 1920

ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

of a local or private nature within it, in the meaning of the words of s. 92.

The result of this is that a Province cannot grant exclusive rights to fish in waters where the public has the right to fish. Now this right in the public was created by the series of statutes enacted in the old Province of Upper and Lower Canada prior to confederation, and as it continued to exist at confederation, only the Dominion could deal with it. As this Board said in the British Columbia case in 1914, the object and effect of the provisions of s. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province. Even under the guise of their taxing powers the Government of the Province could not confer any exclusive or preferential rights of fishing on individuals or classes of individuals, because such exclusion or preference would import regulation and control of the general right of the public to fish.

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the solum kiddles, weirs or other engines of the kind. That is because the solum is not vested in the public, but may be so in either the Crown or private owners. It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself. But it is obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed. The solum and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a private individual, and in so far as this is so it cannot be transferred by regulation. But regulation may proceed very far in limiting the exercise of proprietary rights without ceasing to be regulative.

It thus appears that the question which arises in this appeal

in reality bears a considerable analogy to that which arose in the British Columbia case. It is true that here their Lordships have nothing to do with the public title arising out of the English common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian Legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and s. 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant exclusive leases and licences, to fish in the harbours, roadsteads, creeks or rivers of the old Province of Canada, is the foundation of the public title. This section occurs with the heading "Deep Sea Fisheries," a heading which, in their Lordships' opinion, affects its scope. The language of the section obviously owes its origin to that used in the Newfoundland Fisheries Act, 1699, which, as has been said, was passed for the purpose of encouraging the King's subjects at home to sail to Newfoundland in order to fish. The distinction between coast and inland fisheries could hardly at that time have been an important one, and no distinction was then drawn. There is, however, one significant difference between the enumeration in the Act of 1699 of the waters in which the public may fish and that contained in s. 6 of the Act of 1865. In the former the word "lakes" occurs; in the latter it does not. The introduction into the language of the statute of the heading to s. 6, "Deep Sea Fisheries," when taken in conjunction with the omission of lakes, which are referred to elsewhere in the Act, indicates, in the view their Lordships take of this section, that it was intended to apply only to such fisheries as were either "deep sea," or so accessible from the sea as to make them natural adjuncts to these fisheries. The fisheries to be regarded as so adjoining would not, accordingly, include either the fishing in inland lakes, which are not mentioned, or the right to fish in non-navigable waters. All tidal waters which were navigable would thus

J. C. 1920 ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

be included. Stated generally the test of inclusion appears to be whether the waters in question are such that those who resort to the sea coast to fish there would naturally have access to these waters and would in ordinary course conduct their fishing operations in such a fashion as to extend into them.

As to s. 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licences for fisheries and fishing wherever carried on, this was obviously within the competence of the Legislature which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that s. 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament. No question is at present raised as to existing rights created under any of its provisions. Although the power of the Dominion to legislate about the regulation of inland fisheries extends to all fisheries, even where the public has no right, it is obvious that in substance its powers may be more restricted in their operation wherever the only title to fish is a private one arising simply out of the property in the subjacent soil.

In the Court of King's Bench of Quebec, the first of the questions raised in this appeal was answered by the majority of the learned judges to the effect that the Government of the Province did possess power to grant exclusive rights of fishing in tidal waters. The Chief Justice thought that the effect of the Act of 1865 was that the public right to fish had been abrogated. This seems to import that s. 3 had brought about a transfer of the entire title to fish to the Crown in right of the Province. Their Lordships are unable to concur in this view. They think that s. 3 must be read along with

s. 6, which maintains the public right. No doubt that is maintained subject to the powers given in s. 3, and those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act of 1865 no longer exists in its entirety.

Exclusive rights actually granted while the Act of 1865 was in force are another matter. It has not been brought to the notice of their Lordships that any such have been granted. If there are their position will have to be separately considered.

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

In the result the answer to the questions submitted must be as follows: (1.) To the first question, neither the Government of Quebec, nor any member of the Executive Council, has power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts. In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons

J. C.
1920
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR QUEBEC.

without the aid of such engines. The tidal waters may not extend so far as the limits of the navigable waters, but no distinction between the two descriptions is enacted in the statute of 1865, which is the governing authority. There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. This answer applies to waters between low and high mark. As to waters beyond low mark no answer can properly be given.

(2.) To the second question, as to the power of the Legislature of the Province, the answer is in the negative.

(3.) To the third question, the answer is that restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist, and that therefore the question does not arise.

Their Lordships will humbly advise His Majesty accordingly. There will, following the general practice, be no costs of this appeal.

Solicitors for appellant : *Charles Russell & Co.*
Solicitors for respondent : *Blake & Redden.*

[PRIVY COUNCIL.]

INDIAN IMMIGRATION TRUST BOARD OF NATAL . . . . . } APPLICANTS;

AND

GOVINDASAMY . . . . . RESPONDENT.

J. C.* 1920 Nov. 25.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA.

South Africa (Natal)—Indian Immigrants—Medical Fees—Descendants of indentured Indian—Indian Immigration Act (Law 25 of 1891, Natal), ss. 50, 118.

The word "immigrant" in the expression "every male statute adult immigrant," in respect of whom medical fees are payable under s. 50 of the Indian Immigration Act, 1891 (Natal), is to be interpreted in accordance with the definition of "Indian immigrant" in s. 118 of that Act, and it consequently includes the descendants of an indentured Indian. Judgment of the Supreme Court reversed.

APPEAL from a judgment of the Supreme Court of South Africa (Appellate Division), dated December 11, 1918, reversing a judgment of the Natal Provincial Division of the Supreme Court (April 8, 1918) which affirmed a judgment of the Additional Magistrate of Durban.

The sole question for determination in the appeal was whether the respondent was liable to pay to the appellant Board medical fees in respect of Indians employed by the respondent who were descendants of Indians introduced from India to Natal under statutory regulation. The question depended entirely upon the construction of Law No. 25, 1891, which amended and consolidated the laws relating to the introduction of Indians into Natal and to their regulation and government.

The judgment of the Supreme Court is reported at 1918, A. D. 633 (South African Law Reports).

1920. Oct. 28. *Maugham K.C.* and *Tyldesley Jones K.C.* for the appellants.

Upjohn K.C. and *Dube* for the respondent.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD MOULTON, and LORD PHILLIMORE.

J. C.
1920
INDIAN IMMIGRATION TRUST BOARD OF NATAL v. GOVINDASAMY.

Nov. 25. The judgment of their Lordships was delivered by

LORD DUNEDIN. The question in this case arises under the Indian Immigration Act of Natal, being Law 25 of 1891. By s. 50 of that Act, it is provided that the Immigration Trust Board are authorized "to appoint a duly qualified medical practitioner to attend upon the Indian immigrants employed upon any estate or elsewhere, and upon any such appointment the proprietor of the estate or the employer of such immigrants shall be released from his obligation to obtain a duly qualified medical practitioner to attend upon such immigrants. And every employer of Indian immigrants not being free domestic servants, on any estate or place for which estate or place the said Board may have appointed a medical practitioner as aforesaid, shall pay quarterly on or before January 10, April 10, July 10, and October 10 in each year to the Protector of Indian Immigrants" (for whom for this purpose the appellants were substituted by s. 10 of Act No. 17, 1895), "a sum not exceeding 1*s.* sterling per month for every male statute adult immigrant in the service of such employer."

A medical officer was so provided by the appellants and they applied to the respondents, who employed Indians, for their contribution. The respondents were willing to pay in respect of indentured Indian immigrants, but contended that they were not bound to pay in respect of either (1.) Indian immigrants who had been indentured but whose term of indentured service had expired, and who had not reindentured themselves, and (2.) descendants of Indian immigrants. The local magistrate held that the respondents were liable in respect of both classes (1.) and (2.). Appeal being taken to the Supreme Court of Natal, the learned judges, unanimously on point (1.), by a majority on point (2.), affirmed the decision of the local magistrate. Appeal being taken to the Supreme Court of South Africa that Court upheld the decision as to the Indian immigrants who had been indentured but were subsequently free, but, by a majority, reversed as to the descendants. An appeal has now been taken to this Board

against that decision on the latter point. There is no cross-appeal as to the former.

The question, therefore, is simply whether the word "immigrant" in the expression "every male statute adult immigrant" in s. 50 in respect of whom payment is to be made, does or does not include the descendants of Indian immigrants. Sect. 118 is in the following terms: "The words 'Indian immigrant' shall mean and include all Indians introduced from India to Natal under the provisions of the Laws regulating such introduction, and those descendants of such Indians who may be resident in Natal."

The respondents' first argument is that the interpretation clause does not apply, because in specifying those in respect of whom payment is to be made, the expression is "every male statute adult immigrant," and not "every male statute adult Indian immigrant." To this there are two answers. In the first place the nominative of the whole sentence, which is "every employer of Indian immigrants"—he who is directed to pay—makes it clear that the immigrants in respect of whom he is to pay are Indian immigrants. Otherwise there would be the fantastic result that an employer of immigrants to Natal of whatever nationality in the world would have to pay in respect of these persons if he employed as well at least two Indian immigrants, and would not have to pay if he did not. In the second place, the matter is made clear beyond all doubt by s. 51, which says: "The age of eighteen years and upwards shall be, and is hereby declared to be the age of an Indian immigrant male adult for the purpose of the foregoing section." There seems, therefore, no force in this argument.

Now, when the interpretation clause in a statute says that such and such an expression shall include so and so, a Court in construing a statute is bound to give effect to the direction unless it can be shown that the context of the particular passage where the expression is used shows clearly that the meaning is not in this place to be given effect to, or unless there can be alleged some general reasons of weight why the interpretation clause is to be denied its application. It is

J. C. 1920 — INDIAN IMMIGRATION TRUST BOARD OF NATAL v. GOVINDASAMY.

obvious that there is nothing to be found in the context of s. 50 which would fulfil the first stated requirement. It is accordingly on general considerations that the majority of the Supreme Court have based their judgments. The first suggestion made is that inasmuch as the Act of 1891 is a consolidating, as well as an amending Act, and as one finds that the set of provisions as to medical attendance were in the earlier Acts, which did not mention descendants and had no interpretation clause like s. 118, it may be conjectured that the wider scope of the interpretation clause was meant to be applied to the provisions which were new and not to the provisions which were a repetition of former legislation. This suggestion in their Lordships' opinion loses all force as an argument, from the very fact that is necessary for its statement—namely, that the Act is an amending as well as a consolidating Act. There is no intrinsic improbability that any of the older sections may not be amended, and it is a novel and, to their Lordships, unheard of idea that an interpretation clause which might easily have been so expressed as to cover certain sections and not to cover others should be, when expressed in general terms, divided up by a sort of theory of applicando singula singulis, so as not to apply to sections whose context suggests no difficulty in its application. It is also said that there are sections which show that the interpretation clause does not apply, e.g., s. 10, which says : " Every Indian immigrant leaving India to come to Natal for hire shall, before leaving India, either be engaged to an employer named in his contract, or shall be taken as bound to serve any employer to whom he shall be allotted by the Protector of Indian immigrants on his arrival at Natal."

It is, however, not really accurate to speak of the interpretation clause not applying to such sections ; the interpretation clause remains as it was, applicable to the expression " Indian Immigrant," but among the Indian immigrants there are classes, and such sections as s. 10 obviously only apply to one of them.

The further remark that the time has now come when, both in number and in possible social position, the descendants of

Indian immigrants are such that to hold them among the number of those for whom medical attendance is provided, and in respect of whom payment is to be made, is irksome and unlikely to be the wish of the Legislature, is an argument that might well be addressed to a legislative body, but cannot have weight in the interpretation by a Court of a clause which spoke in an Act, dated nearly forty years ago, when circumstances were very different.

An argument of a very technical character was presented by the learned counsel for the respondents. Taking it that s. 50 was an alternative to s. 48, which imposed on the employer himself the duty of providing medical attendance, he then turned to s. 94, which is the penalty section, and is as follows: "Every employer who shall neglect to retain a duly qualified licensed and registered medical practitioner to attend upon the immigrants in his employ, or who shall fail or neglect to supply proper medicine or nourishment for any such immigrant when sick, or who shall neglect to keep such general and medical register book as provided by this Law, or who himself or by any overseer or sirdar employed by him shall wilfully ill-treat any immigrant in his employ, or who shall fail or neglect to supply to any such immigrant any article of food, or to pay any wages to which such immigrant shall be entitled, shall on conviction thereof before any Court forfeit and pay such sum not exceeding ten pounds sterling for every offence as to the Court shall seem fit, or in default may be adjudged to imprisonment not exceeding thirty days: Provided always, that it shall be at the same time lawful for the Governor, if he shall see fit, to determine the contract of service of such immigrant, and also of any other immigrants in the employ of the same employer and to assign such immigrants to some other person for the residue of the original terms of service of such immigrants respectively." As the proviso, by its terms, can only refer to indentured Indian immigrants he argued that the failure to supply medical attendance can only refer to that class, and that, therefore, the alternative of s. 50 must be commensurate with s. 48 so construed. But s. 94 in its body refers to matters which obviously affect

J. C.
1920
INDIAN IMMIGRATION TRUST BOARD OF NATAL v. GOVINDASAMY.

other Indians than indentured Indians, e.g., payment of wages. It follows that the proviso is not, strictly speaking, a proviso, but is really an added power to be exercised in cases where it is applicable, such as, e.g., cruelty, in favour of the only class to which it is applicable, and cannot control the meaning of the earlier part of the section. In any event, the argument is too subtle and too indirect to prevail over the plain language of s. 118, which finds no obstacle to its application in the phraseology of s. 50. Their Lordships' view may be well summed up in the words of the learned Judge-President Dove Wilson, who said: "I am unable to see anything either in the subject matter or the context to prevent the definition in s. 118 having full force and effect in the application of s. 50."

Their Lordships will humbly advise His Majesty to allow the appeal and restore the judgment of the Provincial division of the Supreme Court affirming the judgment of the local magistrate with costs. The costs of this appeal will be dealt with in accordance with the undertaking of the appellants at the time that special leave to appeal was granted—namely, to pay the costs of the respondents as between solicitor and client in any event.

Solicitors for appellants: *Budd, Johnson, Jecks, & Colclough.*
Solicitor for respondent: *H. S. L. Polak.*

[PRIVY COUNCIL.]

THE CAIRNSMORE.

THE GUNDA.

J. C.*
1920
Dec. 7.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Release of Cargo—Marshal's Expenses—Cost of Insurance.

Claimants to goods seized as prize but released under an order of the Prize Court are not chargeable, as part of the expenses of detention, with the cost of an insurance on the goods effected by the Marshal, unless they have during the currency of the risk assented to the Marshal insuring on their behalf.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize), dated March 30, 1920. (1)

The appeal was by the Procurator-General against a judgment of the President (Sir Henry Duke) holding that the respondents, claimants whose goods had been released to them, were not liable to pay to the Marshal the cost of insuring the goods while they were under detention.

The facts appear from the judgment of their Lordships.

1920. Nov. 5. *Sir Gordon Hewart A.-G.* and *T. Mathew* (*Sir Ernest Pollock S.-G.* with them) for the appellant, the Procurator-General.

Sir Erle Richards K.C. and *Darby* for the respondents. The arguments were substantially those addressed to the Prize Court. In addition to the authorities there mentioned reference was made to *The Düsseldorf*. (2)

Dec. 7. The judgment of their Lordships was delivered by

LORD WRENBURY. This is the appeal of the Procurator-General from an order of the President, Sir Henry Duke, by which he pronounced the cargo owners not to be liable for the premiums or policies of insurance effected by the Marshal

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 209. (2) [1920] A. C. 1034, 1042.

J. C. 1920 THE CAIRNSMORE. THE GUNDA.

against fire, aircraft, and bombardment. The claimants, Messrs. Ballins Sonner and Co., of Copenhagen, were the owners of 1425 tons of quebracho logs laden on the *Cairnsmore* and 2400 tons of quebracho logs laden on the *Gunda* which were seized as prize in July and August, 1915, and were discharged and stored on open ground in the Albert Dock, Leith. The Crown claimed condemnation, but on July 21 and 24, 1916, Sir Samuel Evans ordered the goods to be released. Nevertheless, the greater part of the *Cairnsmore* shipment and the whole of the *Gunda* shipment remained stored at Leith until after July 31, 1919. This was due to the fact that the Danish owners were unable to get shipment for them. Ultimately all the goods were sold and removed.

At the outbreak of war the Admiralty Marshal had effected a general cover by way of insurance against fire of goods which might from time to time be placed in his custody as prize. Further, on May 23, 1918, he gave notice by advertisement and by notice posted to solicitors practising in the Prize Court, including the solicitors for the claimants in this case, that, in addition to the cover already effected against fire, goods in his custody as prize would from that date be insured against aircraft risk and at certain places against bombardment risk. The goods in question in this case were brought under the covers thus effected. The question to be determined is whether a proportion of the premiums, amounting in the aggregate to 910*l.* 4*s.*, is payable by the cargo owners to the Marshal on delivery of the goods as expenses chargeable by the Marshal against the owners. The learned President held that it is not.

The duties and liabilities of the Marshal as executive officer of the Crown in respect of goods placed in his custody under a claim of prize must arise either by statute or apart from statute. Sect. 31 of the Naval Prize Act, 1864, which relates to goods, refers back to s. 16, which relates to ships. The latter is a section which provides for delivery to the Marshal and for retention by the Marshal in his custody subject to the order of the Court. The statute defines no special statutory duties or liabilities in the matter. The

J. C. 1920 THE CAIRNSMORE. THE GUNDA.

duties and liabilities of the Marshal are those which the law imposes upon one who has the custody of the goods of another against the will of that other. His duty is to exercise all due care and diligence in the safe custody of the goods. This is not necessarily limited to such care and diligence as he would exercise if the goods were his own : *The William.* (1) He might be content if the goods were his own to use less care than he owes when they belong to another. He must exercise all due care and diligence, and will be allowed the expenses attending the possession, care, and custody of the property, and those expenses will be treated as a charge upon the property itself : *The Franciska No.* 2 (2) ; *The Düsseldorf.* (3) But captors in cases of bona fide possession are not answerable for incidents not arising from any misconduct on their part : *The Franciska No.* 2. (2) This is equally or even a fortiori true of the Marshal. The liability of the Marshal therefore in respect of fire or like risk is a liability only for his own negligence. The duty of the Marshal to use all due care and diligence does not involve a duty owing to the owner of the goods to insure them while in his custody. It may be quite right and prudent that he should insure the goods to cover his own liability, say for the negligence of his agents, but there is no authority to insure for the benefit of the owner of the goods if they are lost without negligence on the part of the Marshal. The owner may already have covered the risk by an insurance effected on his own behalf. If so, why should he pay a second premium to insure them again ? The owner being, say, a foreign neutral, may prefer to insure them in his own country, where he has perhaps more confidence in the insurance office, or where he will pay a less premium. Or he may prefer to be his own insurer—or, in other words, to accept a risk which he thinks is not likely to result in a loss rather than pay a premium which is in any case money out of pocket. If the owner has not insured elsewhere, and the goods are lost, and the Marshal has effected an insurance which covers the risk, the owner may no doubt

(1) (1806) 6 C. Rob. 316. (2) (1856) 10 Moo. P. C. 73.
(3) [1920] A. C. 1034.

J. C. 1920 THE CAIRNSMORE. THE GUNDA.

have the benefit of it, and can only have the benefit of it if he pays the premium. But it does not follow that he is bound to pay the premium and take the benefit.

The point is not without authority. In *The Catherine and Anna* (1) an order had been made to restore a ship on payment of the captor's expenses. The captor had insured the ship against fire. Sir William Scott held that the costs of insurance were not to be allowed as captor's expenses, meaning "expenses that are necessarily incurred by the act of capture." Sir William Scott there said: "Captors are generally bound for two things—for safe and fair custody, and if the property is lost or destroyed for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident, or mere casualty, happens, against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged. If to secure himself against the negligence of his own agents, or to secure his own responsibility, the captor chooses to make insurance, I understand the practice of the registrar and merchants has been, not to allow it in their report, and I am not prepared to say, upon any principle which occurs to me, that such a disallowance is wrong. . . . . The claimant is not bound to look further, nor to contribute to the expense which the captor, for his own security, may choose to incur."

In that case the claimants had in fact previously effected an insurance themselves, but their Lordships do not find in this fact anything to affect the principle of the decision.

In *The Südmark* (*No.* 2) (2), Lord Parker of Waddington in delivering the judgment of this Board said: "It was suggested that if an application had been made to the Prize Court the appellants would in some way or other have obtained the advantage of some insurance effected or to be effected by the Prize Court marshal. This may or may not be the case, but their Lordships are quite satisfied that there is no obligation on the part of the Crown or its executive officers, or the Prize Court marshal, to effect insurances against fire for the

(1) (1801) 4 C. Rob. 39, 40. (2) [1918] A. C. 475, 484.

benefit of cargo owners, whether the cargo be landed or kept on board a captured ship."

There is in their Lordships' opinion not sufficient evidence that in this case the cargo owners, during the currency of the risk, assented to the Marshal insuring the goods on their behalf, in which case, of course, they might have been liable for the reasonable cost of such an insurance.

Their Lordships are of opinion that the President was right in holding that the premiums cannot be claimed as expenses to be recouped to the Marshal on delivery of the goods.

There is a subsidiary point in the present case which is of no general importance. On March 16, 1918, the solicitors for the claimants wrote to the Marshal that their clients were remitting them a sum "to pay all the charges of detention. . . . ." On March 18, 1918, the Marshal replied acknowledging receipt of the letter of March 16 "advising me that you shortly expect a remittance to cover the charges of detention, insurance, etc." The word "insurance" is not found in the letter of March 16. On November 7 the claimants' solicitors wrote to the Marshal asking "what the cost of insurance amounts to." In February, 1919, the purchasers of the goods were prepared to take delivery, but the Marshal refused to direct the Collector of Customs at Leith to give delivery until the solicitors had given their personal undertaking to pay all the Marshal's charges including the cost of insurance. On February 26, 1919, the solicitors gave the undertaking. This related to a first parcel of goods. On July 29, 1919, they gave a similar undertaking as to the second parcel. Their Lordships do not find that these facts in any way affect the question to be decided. There was no consideration and no admission or acceptance of liability in the matter. The claimants' solicitors very sensibly gave their personal undertaking to pay without which they could not get delivery, leaving the rights of the parties unaffected.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

J. C.* 1920 Dec. 16.

THE SHIP "MARLBOROUGH HILL" . APPELLANT;

AND

ALEX. COWAN AND SONS, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Ship—Admiralty Jurisdiction—Bill of Lading—Arrest of Ship—Joinder of Plaintiffs—Admiralty Court Act, 1861 (24 & 25 *Vict. c.* 10), *s.* 6—*Colonial Courts of Admiralty Act*, 1890 (53 & 54 *Vict. c.* 27), *s.* 2, *sub-s.* 2.

A document whereby the receipt of goods is acknowledged for shipment on board a named ship or on some other ship for carriage by sea and delivery to the shipper's order, the document being signed on behalf of the master, is a bill of lading for the purposes of the Bills of Lading Act, 1855, and the Admiralty Court Act, 1861, s. 6.

Parcels of goods were accepted in New York for delivery at Sydney to the shippers' order, there being given to each shipper a document of the above-mentioned character. Upon the named ship arriving at Sydney the goods were not delivered. The respondents, twenty firms each being indorsees of one of the documents, issued a joint writ in rem claiming severally to recover damages. The writ stated that the plaintiffs claimed as consignees or indorsees of bills of lading for non-delivery of goods agreed to be carried by the named ship, or agreed to be shipped within a reasonable time by some other vessel of the same line. On affidavits sworn separately by the plaintiffs, alleging that the goods were either lost or were not shipped on any other vessel within a reasonable time, the ship was arrested. The owners of the ship took out a summons to set aside the writ and all proceedings thereunder:—

Held, (1.) that the documents in question were bills of lading within s. 6 of the Admiralty Court Act, 1861; and that the proceedings being to set aside the writ and it not being denied that some of the goods were received on board, the action should proceed; (2.) that, the action being in rem and the joinder of the plaintiffs convenient, the view of the Full Bench of the Supreme Court that the plaintiffs could properly be joined under the rules locally applicable should not be interfered with.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of New South Wales in its Admiralty jurisdiction (August 28, 1919) upon a special case stated.

* *Present:* VISCOUNT CAVE, LORD DUNEDIN, LORD MOULTON, and LORD PHILLIMORE.

The appeal raised the question, inter alia, whether a document whereby the receipt of goods is acknowledged for shipment on board a named ship or on some other ship of certain lines for carriage by sea and delivery to the shipper's order, the document being signed on behalf of the master, is a bill of lading within the meaning of the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 6.

The facts and the terms of the above-mentioned section appear from the judgment of their Lordships.

1920. Oct. 29, Nov. 1. *R. A. Wright K.C.* and *Claughton Scott* for the appellants. There was no Admiralty jurisdiction in this matter, and consequently the respondents had no right to issue a writ in rem or to arrest the ship. The Admiralty jurisdiction of the Supreme Court arises under the Colonial Courts of Admiralty Act, 1890, which makes the Admiralty Court Act, 1861, s. 6, applicable mutatis mutandis. But the documents sued on in this case were not bills of lading within the meaning of that section, since they did not acknowledge the receipt of the goods on board a named vessel; if they were bills of lading they were not bills of lading for the carriage of goods in the *Marlborough Hill*. Secondly, there was no proof that any of the goods were received on board the *Marlborough Hill*. Although it may be that the words "carried into any port" in s. 6 of the Admiralty Court Act, 1861, are to be deemed to include cases in which goods were agreed to be carried, yet it is essential that there should be proof that the goods were placed on board the ship. [Reference was made to *The Ironsides* (1), *The Danzig* (2), *The Bahia* (3), *The Pieve Superiore* (4); also, as to "bill of lading," to *The Caroline Miller*. (5)]

Further the respondents could not be joined as plaintiffs in one action. This question depends upon r. 29 of the rules of the Supreme Court (Admiralty Jurisdiction) and not upon

(1) (1862) Lush. 458.
(2) (1863) Br. & Lush. 102.
(3) (1863) Br. & Lush. 61.
(4) (1874) L. R. 5 P. C. 482.
(5) (1892) 53 Fed. Rep. 136.

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

the English authorities. There was in this case no such identity of interest as made that rule applicable. [Reference was made to *The Maréchal Suchet.* (1)]

MacKinnon K.C. and *Sinclair Johnson* for the respondents. Under modern commercial practice documents acknowledging the receipt of goods for shipment are common, and are treated commercially as being bills of lading; to hold that they are not so would raise serious commercial difficulties. Documents of that description have frequently been assumed by English Courts to be bills of lading for the purposes of the Bills of Lading Act, 1855; see for example: *Elder, Dempster & Co.* v. *Dunn & Co.* (2); *Morrison & Co.* v. *Shaw Savill & Albion Co.* (3); *Bruce Marriott & Co.* v. *Houlder Line* (4); *Broken Hill Co.* v. *P. & O. Co.* (5); *New Chinese Antimony Co.* v. *Ocean Steamship Co.* (6)

In *The Cap Blanco* (7), in which it was held that there was jurisdiction under s. 6 of the Admiralty Court Act, 1861, in the case of a German ship calling at Southampton with a cargo to be delivered at Monte Video, the "bill of lading" stated that the goods were for shipment per the *Cap Blanco* "or another steamer." The Supreme Court rightly held that the question whether the goods were shipped should be decided at the trial. It may be that whether in particular circumstances there is jurisdiction under the Act can only be properly ascertained at the trial. For instance, a question might arise whether the contract was with the shipowner or with the charterer, as in *Manchester Trust* v. *Furness* (8), *Tillmanns & Co.* v. *Steamship Knutsford* (9), and *The Okehampton.* (10) The shipowner is protected because under *Grant* v. *Norway* (11) he is not liable unless the goods were put on board. The burden of proof that none of the goods were shipped in the *Marlborough Hill* was upon the appellant, and it was not discharged. With regard to the

(1) [1896] P. 233.
(2) (1909) 15 Com. Cas. 49.
(3) (1916) 22 Com. Cas. 81.
(4) (1916) 22 Com. Cas. 116.
(5) (1916) 22 Com. Cas. 178.
(6) [1917] 2 K. B. 664.
(7) [1913] P. 130.
(8) [1895] 2 Q. B. 539.
(9) [1908] 1 K. B. 185.
(10) [1913] P. 54, 173.
(11) (1851) 10 C. B. 665.

authority of Funch, Edye & Co. to sign on behalf of the master, the fact that they did so raises a prima facie case. With regard to the joinder of the respondents, there was power under r. 29; that rule should be liberally construed. The Board will not readily interfere with the decision of the Supreme Court as to the construction of its rules. *Smurthwaite* v. *Hannay* (1) was decided upon a narrow construction of the English rule then applicable; that decision is not applicable under the altered English rule, Order XVI., r. 9: *Compania Sansinena* v. *Houlder Brothers & Co.* (2); *Markt & Co.* v. *Knight Steamship Co.* (3)

Claughton Scott in reply. *The Ironsides* (4) decides that there is no jurisdiction under s. 6 of the Admiralty Court Act, 1861, unless the goods are shown to have been put on board. The decision to that extent is good law, even if it is not consistent with *The Danzig* (5) with regard to the words "carried into any port."

Dec. 16. The judgment of their Lordships was delivered by

LORD PHILLIMORE. In the month of June, 1919, the Finnish sailing ship *Marlborough Hill* arrived at Sydney on a voyage from New York, and on June 12, a writ in rem at the instance of some twenty plaintiffs, the present respondents, was issued against the ship, in an action for non-delivery of goods under bills of lading.

The writ was indorsed as follows: "The plaintiffs claim as consignees and indorsees of bills of lading for non-delivery of goods agreed to be carried by the said ship *Marlborough Hill*, and delivered to the plaintiffs respectively at Sydney, or agreed to be shipped within a reasonable time by some other vessel of the same line, and delivered to the plaintiffs respectively in Sydney, and for the loss and value of the goods undelivered as aforesaid, and the plaintiffs claim the sum of £1,515 for the loss aforesaid and for costs." There followed particulars of the several claims, the largest being for 334*l.*,

(1) [1894] A. C. 494.
(2) [1910] 2 K. B. 354.
(3) [1910] 2 K. B. 1021.
(4) Lush. 458.
(5) Br. & Lush. 102.

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

and the smallest for 3*l.* 16*s.* Affidavits were sworn separately by each of the plaintiffs on or about June 12. They were all in similar form and averred that in November, 1918, bills of lading were signed for on behalf of the master by a firm of agents for the carriage of certain cargo from New York to Sydney to be delivered to the holders of the bills of lading; that the plaintiffs were indorsees of the bills of lading; that "the said goods were either lost during the said voyage or were not shipped either by the said vessel or by any other vessel within a reasonable time, and were not delivered to the plaintiff as agreed"; with further necessary formal statements to support process. Thereupon a warrant was issued to arrest the ship, and she was held to bail, and the necessary bail bond having been entered into, the ship was released. It is presumed that an appearance must have been entered on behalf of the owner of the ship, at or before the time when the bail bond was given; but the actual form of the appearance is not upon the record, and their Lordships have no information whether it was an absolute appearance or an appearance under protest.

The rules in the Admiralty Jurisdiction of the Supreme Court of New South Wales make no specific provision for an appearance under protest. But by r. 155: "in all cases not provided for by these rules the practice of the Court in its Common Law jurisdiction shall be followed, or in cases therein unprovided for the practice of the Admiralty Division of the High Court of Justice of England shall be followed." And the usual mode of raising an objection to the jurisdiction in Admiralty cases is by appearing under protest.

However this may be, on June 17 a summons was taken out on behalf of the owner of the ship to set aside the writ and all proceedings thereupon, on the ground that the claims of the various plaintiffs in respect of which the writ had been issued were separate and distinct claims, and could not legally be joined together in one action. In support of this application, an affidavit was filed sworn by one Frank Linton. The terms of this affidavit will be discussed later. The application was heard by Owen J. in chambers on two occasions. On

the second occasion, a further point was taken on behalf of the shipowner to the effect that no such action would lie in Admiralty even if brought by each plaintiff separately, or alternatively, that some of the claims were outside the jurisdiction. The judge allowed this further point to be raised, and then had the whole matter stated in the form of a special case for decision by the full Court.

The questions submitted for the opinion of the Court were two: "(1.) Has the Supreme Court of New South Wales in its Admiralty jurisdiction under the circumstances set out herein any jurisdiction to hear and determine this action? (2.) Are the plaintiffs properly joined in this action?" After argument the full Court ordered: "that the said questions of law should be answered as follows: (1.) The Supreme Court of New South Wales in its Admiralty Jurisdiction has jurisdiction to hear and determine this action, but it is necessary in order to succeed there that each plaintiff should prove that the goods in respect of which he claims were shipped on board the *Marlborough Hill*. (2.) Yes." It is from this decision that the shipowner has appealed to the King in Council.

An extract from the bill of lading was annexed to the special case, but their Lordships have had the full document submitted to them.

Admiralty jurisdiction is conferred upon the Supreme Court of New South Wales by the Colonial Courts of Admiralty Act of 1890, which in substance provides that the jurisdiction of a Colonial Court of Admiralty shall be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, and that the Colonial Court may exercise such jurisdiction in the manner, and to as full an extent as the High Court in England. The Admiralty jurisdiction of the High Court in England, with a consequent right to try actions in this class either in rem or in personam, arises from s. 6 of the Admiralty Court Act, 1861, whereby it is provided that: "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

port in England or Wales, in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. . . . ." By a provision of the Colonial Courts of Admiralty Act, the words "domiciled in England or Wales" must mean in this case "domiciled in New South Wales," which the owner of this ship was not.

The first point taken on behalf of the appellant is that this purports to be a claim by the assignee of a bill of lading, and that the shipping instrument on which reliance is placed is not a bill of lading; and this point requires some careful consideration. The document is not in the old form of a bill of lading. The old form starts with a statement or acknowledgment that the goods have been shipped. It runs "shipped on board," etc. But this document runs "received in apparent good order and condition from . . . . for shipment." The old form is precise that the goods have been shipped on board the particular vessel, though the conditions of the bill of lading may proceed afterwards to permit of transhipment. This document runs to the effect that the goods have been received for shipment by the sailing vessel called the *Marlborough Hill*, or by some other vessel owned or operated by the Commonwealth and Dominion Line, Ltd., Cunard Line, Australasian service; and the first term which is expressed to be mutually agreed is to the effect that the shipowner may substitute or tranship the whole or any portion of the goods by any other prior or subsequent vessel at the original port of shipment, or at any other place. The contract, therefore, is not one by which the shipment on the particular vessel proceeded against is admitted, nor one whereby the shipowner or his agent or the master contracts to carry and deliver by that ship. It is one whereby the agents for the master put their signature to the contract, admit the receipt for shipment and contract to carry and deliver, primarily by the named ship *Marlborough Hill*, but

with power to substitute any other vessel owned and operated by the specified line, or possibly under the first condition by any other ship whatsoever. But the contract does contain the further obligation that, subject to the excepted conditions and perils, either the named ship or the substituted ship shall duly and safely carry and deliver.

It is a matter of commercial notoriety, and their Lordships have been furnished with several instances of it, that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form "received for shipment" instead of "shipped on board," and further with the alternative contract to carry or procure some other vessel (possibly with some limitations as to the choice of the other vessel) to carry, instead of the original ship. It is contended, however, that such shipping instruments, whatever they may be called in commerce or by men of business, are nevertheless not bills of lading within the Bills of Lading Act, 1855, and it is said therefore not bills of lading within the meaning of the Admiralty Court Act, 1861.

Their Lordships are not disposed to take so narrow a view of a commercial document. To take the first objection first. There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail. The two forms of a bill of lading may well stand, as their Lordships understand that they stand, together. The older is still in the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas "received for shipment" is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment.

If this document is a bill of lading, it is a negotiable instrument. Money can be advanced upon it, and business can be done in the way in which maritime commerce has been carried on for at least half a century, throughout the civilized world. Both parties have agreed to call this a bill of lading; both, by its terms have entered into obligations and acquired rights such as are proper to a bill of lading. All the other incidents in its very detailed language are such as are proper to such a document. The goods are marked and numbered as stated in the margin, and are to be delivered to the order of the shipper or his assignees, on payment of freight and charges. There are the usual, now in modern times very detailed, provisions and excepted perils. There are provisions for the payment of general average; that the shipper is to be liable to the shipowner for damage owing to his having shipped dangerous goods; and that he shall pay all expenses for reconditioning and gathering of loose cargo. The shipowner is to have a lien on the goods, not only for freight, but for fines, damages, costs and expenses which may be incurred by any defect in insufficient marking or description of contents. It is called a bill of lading many times in the course of the fifteen provisions, and particularly in the last, where it is provided that the shipment, being from New York, shall be subject to all the provisions of certain statutes of the United States, and specially to the well-known Harter Act. The list closes as follows: "In accepting this bill of lading, the shipper, owner and consignee of the goods, and holder of the bill of lading, agrees to be bound by all its stipulations, exceptions and conditions, whether written, stamped or printed, as fully as if they were all signed by the shipper,

owner, consignee or holder, any local customs or privileges to the contrary notwithstanding. If required by the shipowner, one signed bill of lading, duly endorsed, must be surrendered on delivery of the goods"; and then the document ends in the time honoured form. "In witness whereof the master or agent of said vessel has signed three bills of lading, all of this tenor and date, of which if one is accomplished, the others shall be void."

No doubt it appears from the margin that it is the form in use by the Commonwealth and Dominion Line, Ld., Cunard Line, Australasian service, trading from New York to Australia and New Zealand, with Funch, Edye & Co. Incorporated, as the American agents; and it may be said that it is not signed by the master, but by that firm as agents for the master. It is, however, well known that in general ships the master does not usually sign. The bills of lading are signed in the agents' office by the agents. It should perhaps be added that it is evidently contemplated by the document that the shipper will assign his rights and that the assignee or holder of the bill of lading will present the document at the port of delivery, and that his receipt and not that of the shipper will be the discharge to the shipowner.

Their Lordships conclude that it is a bill of lading within the meaning of the Admiralty Court Act, 1861.

It is next contended on behalf of the appellant that at any rate no writ in rem could be issued against the ship *Marlborough Hill*, in respect of any goods, except those which were actually shipped on board, which is no doubt the view which the Supreme Court has taken, as is shown by answer No. 1—an answer from which there is no cross-appeal—and that this being so there is no averment, and at any rate no proof that any of the goods in question were shipped on board this particular vessel. The language of the indorsement of the writ has already been given, and both it and the affidavits to lead the warrant are not precise and positive that any goods were actually shipped on board the *Marlborough Hill*.

As regards the affidavits, their Lordships have not to consider whether they were sufficient in form to support a warrant

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

for arrest, or whether upon such affidavits the proper officer ought to have allowed the warrant to go. The summons was not a summons to set aside the warrant or to release the ship without bail, but to set aside the writ and all further proceedings. Nor was the summons originally taken out on this ground.

Turning to the indorsement on the writ and accepting for this purpose the position that there would be no right in rem, except in respect of goods actually shipped on board the particular ship, the indorsement is no doubt open to some objection for uncertainty. But it is not usual to take the extreme course of setting aside a writ for a defect in the indorsement, unless indeed it appears that there is substance behind the objection. And if the several documents which were before the full Court are closely scrutinized, it would appear that the fact that some at least of the goods were shipped was not brought into controversy. The judge's notes on the argument before him in chambers were made an exhibit to the special case, and it should be observed that when application was made for leave to take the second point, the way in which it was brought before the judge was that the counsel for the defendant, using the language of the note, "wished to object that no such action would lie in Admiralty even if brought by each plaintiff separately, or" (and this is to be noted) "some of the claims are outside the jurisdiction of the Court."

Mr. Linton's affidavit states that he is informed by the master, and believes, that separate and distinct bills of lading or shipping receipts were issued for the several goods of the several plaintiffs. This is correct. He proceeds to state that all the goods in respect of which the plaintiffs are claiming were received for shipment under the terms of these bills of lading or shipping receipts, which appears to be an admission that at any rate all the goods were received for shipment. He does not proceed to say that any of them, still less that some of them, were not shipped on board the *Marlborough Hill*. In the reasons for the judgment of the full Court, it appears that the first objection was that none

of the goods had been carried into the port of Sydney; a verbal objection to the terms of the statute, which was got over by Dr. Lushington in very early days in the case of *The Danzig* (1), a decision which has not since been questioned, and which counsel for the appellants did not question now. The second objection was that there was no evidence that the goods were in fact ever shipped on board the *Marlborough Hill*. On this the full Court observed that: "in our opinion that objection to the jurisdiction fails, and cannot be given effect to at the present stage," and again, "the plaintiffs do not admit that their goods were not so shipped. At the most their affidavit states that they are uncertain whether they would be able at the trial to prove that fact—a fact which is, as we think, essential to their success."

In their Lordships' opinion the full Court dealt with this point in the proper manner. This was not the kind of objection which would warrant a summary dismissal of the action at this early stage, and by this form of procedure, an unusual one, especially if there was no appearance under protest. When the action proceeds, the statement of claim must make the proper averments, and at the trial they must be proved, or the plaintiffs will fail. The defendants have the advantage that they have an expression of opinion by the full Court, and possibly it should be considered as a decision of the full Court, from which there has been no appeal, that the case will fail except as to goods actually shipped on board the *Marlborough Hill*. In other words, the opinion or decision of the full Court is that the contract in a bill of lading, whatever obligation it imposes upon the shipowner in an action in personam, cannot be considered as giving a right in rem except for such goods as were actually shipped on board the res. From the course this case has taken, this point does not come before their Lordships for decision, and therefore they do not decide upon it; but they desire it to be understood that they have formed no opinion contrary to the view taken by the full Court. It is enough to say that for the reasons given by the full Court, their Lordships think that it was right

(1) Br. & Lush. 102.

J. C. 1920 "MARLBOROUGH HILL" (SHIP) v. COWAN & SONS.

to allow the action to proceed, unless the second objection, which they are about to deal with, is fatal to it.

This second objection is that each plaintiff ought to have sued separately. On this point authorities upon the construction of the rules of the Supreme Court of Judicature in England were cited. Their Lordships on the whole think that these are not applicable. The matter is covered, so far as the Court in question is concerned, either by r. 29 : "Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants," or by r. 155, already quoted. It might no doubt be that with regard to the new subjects of jurisdiction conferred upon the High Court of Admiralty by the Act of 1861, a different practice should prevail. But at any rate with regard to the subjects of the older Admiralty jurisdiction such an objection as that now raised was unheard of. In an action for collision claims by shipowner, and if the ship were lost, by cargo owner, by master and crew, who had lost their clothes and effects, by representatives of seamen drowned claiming for goods and effects of the deceased, were always joined in one action. In cases of salvage, the owners, master and crew of the salving vessel were always joined. In cases of wages, all the seamen joined in one action, though some of them were taken on board at the commencement of the voyage and stayed to the end, while others may have been shipped or discharged at intermediate ports. If separate actions had been started, the Court would have at once consolidated them, and probably punished those who had brought separate actions by making them pay the costs up to consolidation. More than this, if two or more vessels were engaged in salvage, even though at different periods, and of a different nature, it was not unusual to join them in one action. In the case cited in argument in the Court below, *The Maréchal Suchet* (1), the propriety of this course was expressly confirmed, and the argument from the general rules of the Supreme Court of Judicature was put aside.

(1) [1896] P. 236, 237.

The procedure in rem has some different incidents from those appropriate to an ordinary action inter partes, and their Lordships think it open to them to consider the general question of convenience in such actions, treating them as being of a special nature.

If each of these twenty or more parties had been obliged to issue a separate writ, and to apply, as would be the consequence for separate warrants, several of them for sums under 10*l.*, the costs would be enormous; and it is for the interest of shipowners that joinder of plaintiffs in such cases should be encouraged.

Admiralty jurisdiction originated in the civil law, and never lost all touch and connection with it. Its procedure was malleable and adaptable. The ordinary procedure in such a case as the present would be that if the plaintiffs obtained a primary judgment their several claims would be referred to the Registrar, who would deal with each separately, and on his report the Court would deal with the costs. Their Lordships, while thinking it unnecessary that they should give an express construction of the words in r. 29, are not disposed to interfere with the decision of the Supreme Court on what they regard as a question of procedure.

Upon the whole their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellant: *William A. Crump & Son.*

Solicitors for respondents: *Snow, Fox, Higginson & Thompson.*

[PRIVY COUNCIL.]

J. C.*
1920
Dec. 16.

THE BERNISSE.

THE ELVE.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Damages against the Crown—Diversion of neutral Ships—Misconstruction of Order in Council—Right of Search—Order in Council of February 16, 1917.

Two neutral ships bound from a French colonial port to Rotterdam with cargoes of ground nuts, and each having a document called an "acquit à caution," showing that the shipment was by the permission of the French authorities, were stopped by a British cruiser and ordered into Kirkwall. That order was given not on account of any suspicion with regard to the cargoes, but because neither ship had the document (known as a green clearance) given to ships which started from a British port on a voyage to a port affording access to enemy territory, or which when on such a voyage wherever commenced had called at a British port for the examination of her cargo in order to comply with the Order in Council of February 16, 1917 (the second reprisals Order). While the ships were proceeding to Kirkwall, which involved passing through an area more dangerous from German submarines than the course which it was intended to take, they were attacked by a German submarine; one ship was sunk and the other damaged. The owners of the ships and cargoes brought actions in the Prize Court against the Procurator-General to recover damages:—

Held, that the Order in Council did not apply to a ship which started from a British or Allied port, and that the owners were entitled to recover damages although the order to proceed to Kirkwall was given under an honest mistake as to the effect of the Order in Council.

The Ostsee (1855) 9 Moo. P. C. 150 followed.

The Luna (1810) Edw. 190 discussed.

Observations with regard to the right to send a ship into port for search, and the slight suspicion which may justify that course being taken.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of Admiralty Division (in Prize), dated July 25, 1919. (1)

The appeal was by the Procurator-General from a judgment of the President (Lord Sterndale) holding him liable in damages to the respondents in circumstances appearing from the judgment of their Lordships.

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 1.

1920. Nov. 1. *Sir Ernest Pollock S.-G.* and *Bruce Thomas* for the appellant. The Procurator-General should not have been held liable in damages. First, the ordering into Kirkwall was a bona fide exercise of the belligerent right of search, a right which exists apart from whether or not contraband is found on board: *The Maria.* (1) Under modern conditions of war it is not practicable to search a ship effectively at sea, and the practice is to order a ship into port for that purpose: *The Zamora* (2); *The Regina d'Italia.* (3) The absence of the "green clearance" raised a doubt whether the cargo had been searched for contraband by a competent authority. The "acquit à caution" was not conclusive on that question. Secondly, the ships were properly taken into port having regard to the Order in Council of February 16, 1917. They were within Art. 1 of that Order, and had not called at "an appointed British or Allied port" within the meaning of the proviso in Art. 2. But in any case an obligation to pay damages should not be imposed as a consequence of an honest mistake with regard to the effect of the Order in Council: *The Sigurd* (4); *The Luna.* (5) *The Ostsee* (6) did not decide to the contrary.

Sir Erle Richards K.C. and *Bisschop* for the respondents. There was no reasonable ground for sending the ship into Kirkwall, since there was no ground for suspicion that she was carrying contraband: Oppenheim on International Law, 2nd ed., vol. ii., p. 539. The French documents were sufficient authority from an Allied Government, and no "green clearance" was necessary. The fact that the naval officer acted under a mistaken view of the effect of the Order in Council is no answer to the claim to damages. The Privy Council in *The Ostsee* (6) held that the true rule was laid down by *The Acteon* (7), not by *The Luna.* (5)

Sir Ernest Pollock S.-G. replied.

(1) (1799) 1 C. Rob. 340.
(2) [1916] 2 A. C. 77, 108.
(3) Feb. 6, 1919. Unreported.
(4) [1917] P. 250.
(5) Edw. 190.
(6) 9 Moo. P. C. 150.
(7) (1815) 2 Dods. 48.

J. C.
1920
THE BERNISSE.
THE ELVE.

Dec. 16. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This is an appeal by the Procurator-General from a decree of Lord Sterndale dated July 25, 1919, in a consolidated action brought by the respondents, the owners of the steamship *Elve* and of the steamship *Bernisse* and of their cargoes, whereby the learned President decreed on the claim in respect of the *Elve* restitution in value, and gave damages in respect of the *Bernisse*, which had already been released but in a damaged condition.

The steamships were owned by P. A. Van Es and Company, a Dutch firm at Rotterdam, and were chartered to a Dutch company in business at Delft for the carriage of cargoes of ground nuts from the Port of Rufisque, in the French colony of Senegal, to Rotterdam. The Dutch company had factories at various places in Holland, where the ground nuts were dealt with and oil was extracted from them. This importation had commenced before the war. It was for a time stopped on the outbreak of war, but the object of it having been explained to and looked into by the French Government, it was permitted to proceed under agreed conditions and guarantees. Each consignment of ground nuts was to be accompanied by a document called an "acquit à caution," issued by the French colonial authorities at the port of loading and which was to be deposited on arrival in Holland with a representative of the French customs authorities at the port of discharge whose duty it was to take precautions to secure that the ground nuts were used at the factories and that the products did not go to an enemy destination.

On May 20, 1917, the two steamships sailing in company with cargoes of ground nuts in bulk were proceeding on the voyage from Rufisque to Rotterdam by the route then considered the safest, round the north of Scotland, and on that day they were stopped by H.M.S. *Patia*, an auxiliary cruiser, at a point situate in latitude 62° 4′ N., and longitude 15° 10′ W. This spot is in the North Atlantic, approximately west of the Orkneys, and is outside the zone within which the Germans had announced their intention of sinking all neutral vessels.

J. C. 1920 THE BERNISSE. THE ELVE.

At the time the vessels were so stopped the Order in Council of February 16, 1917, was in force and was being acted on by H.M. cruisers, and as it is necessary on this appeal to consider the words of that Order it is well to set out the operative part: "1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for the adjudication before the Prize Court. 2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or Allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in article 1 shall arise. 3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation. 4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order."

It had become the practice to give to any vessel which started from a British port on a voyage to a port affording access to enemy territory, or which when on such a voyage wherever commenced had, in order to comply with the Order in Council, called at a British port for the examination of her cargo, a clearance on a green card, which became known as a green clearance. When the two steamers were stopped, they were boarded by an officer from H.M.S. *Patia*, who made the usual inquiries, and was told the port from which the vessels had come, and that to which they were bound, and was shown her French documents, including the "acquit à caution." The officer asked if they had a green clearance, and was of course told that they had not. He ascertained

J. C. 1920 THE BERNISSE. THE ELVE.

that the cargo was in bulk, and in his evidence at the trial he gave a decided opinion that it would have been impossible to examine the ships at sea in order to find out whether there was anything hidden under the cargo. He stated, however, that if there had been a green clearance, or in other words, if the cargoes had been examined at a British port, he would have been satisfied. Being in doubt what to do, he reported the facts by signal to the captain of the *Patia*, and the captain being also puzzled, reported them by wireless to the admiral in command of the cruiser squadron, who directed that the vessels should be sent in to Kirkwall. They were accordingly ordered to go there, and an officer and three men were put on each steamer to see that they went. The captains remonstrated on the ground that they would have to go through the danger zone, but they were told that it did not make much difference, as there were German submarines about outside the zone as well as within it, and that they sank vessels wherever they met them, so that ships were nearly as likely to be torpedoed outside the zone as in. On this point the learned President, although he did not think it material, found that there was greater danger on the route the ships were directed to go than on that which they had intended to take, and their Lordships would not be inclined and indeed have not been asked to differ from the learned President on this point. The vessels did when within the zone encounter a German submarine, which fired on them without previous warning, and sank the *Elve* by one torpedo, and seriously damaged the *Bernisse* with another. Fortunately a British cruiser appeared, which took on board the crews of the vessels, who had taken to their boats, and towed the *Bernisse* in her damaged condition into Kirkwall. The *Bernisse* was temporarily repaired, and ultimately was allowed to proceed on her voyage to Rotterdam, and it is in evidence that her cargo was never examined, although in the course of the repairs it probably became evident that there was no contraband on board. On these facts the learned President has held that there was no ground in fact for detaining the vessels and sending them into Kirkwall,

and further that there was no such reasonable ground for thinking that there was as to relieve the Crown from paying the damages arising from sending them in, and it is on the latter point that the appeal has been brought.

It is necessary first to consider the construction of the Order in Council. It has been held by this Board that the Order is binding on neutrals : see *The Stigstad* (1) ; also *The Leonora* (2) ; and the Order expressly directs that vessels which come within the first clause shall be brought in for examination. The Order is not very happily worded, but these vessels having started from an Allied port do not come within the Order at all, unless the words " without calling at " imposed on a vessel the obligation for a subsequent call even although her cargo has been duly examined and passed at the British or the Allied port from which she started. This is an impossible construction. Having regard to the fact that the object of requiring a call is to ensure that there shall be an opportunity of examining the cargo, it seems clear that " calling at " must include " having been at " a British or Allied port when the port was the original port of departure on the voyage ; and as regards the want of a green clearance, that would only be given at a British port, and it really is quite clear that throughout the Order an Allied port is put on the same footing as a British port. The President so held, and their Lordships agree with him.

As there was in this case no ground whatever proved on which either ships or cargo could have been condemned as prize, any more than any ground for detaining them under the Order in Council, the question remaining is merely that of reasonable ground for the action taken. To show such ground the Crown rely on two points. First they say that the detention was a legitimate exercise of the right of search. In this war it has been agreed that search at sea has been practically impossible, and sending in to port for search has been almost universal. In this case further there was evidence that the search at sea for contraband hidden under the ground nuts would have been impossible. The President, however,

(1) [1919] A. C. 279. (2) [1919] A. C. 974.

J. C. 1920 — THE BERNISSE. — THE ELVE.

has disposed of this point by saying that even if the officers might have suspected that something contraband was hidden under the ground nuts, in fact they did not do so and have never said that they did. They really only sent the vessels in because there was no green clearance. This seems a sufficient answer, and it is unnecessary to go further, but counsel for the respondents do further argue that even for a search reasonable ground of suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is of course correct, but so little suspicion is required to justify a search that their Lordships are not prepared to say that if a boarding officer were to state that finding a cargo to be in bulk he thought something might be hidden under it, and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. That case must be considered if it should arise. Here it does not appear to arise.

The second point on which the Crown rely is really the only one which gives rise to any difficulty. It is that there was a bona fide doubt on the part of the officers who gave the order for detention, as to the true construction of the Order in Council. The question as to what is sufficient to relieve a captor from paying damages in respect of a capture which is afterwards decided to be in fact wrongful was very fully considered in the case of *The Ostsee*. (1) It was there held that to exempt captors from costs and damages there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. That case arose during the Crimean War, and the cases down to that date were very fully dealt with. The only case which at all supports the contention put forward by the Crown in the present case is *The Luna*. (2) There a neutral vessel proceeding to St. Sebastian, in Spain, which had at the time been for two years in the occupation of the French, was seized for alleged

(1) 9 Moo. P. C. 150. (2) Edw. 190.

breach of blockade by British captors who were in bona fide doubt whether or not an Order in Council of April 26, 1809, declaring a blockade of "ports and places under the government of France" extended to San Sebastian so temporarily in French occupation. Sir William Scott held that it did not so extend, and decreed simple restitution, and he not only refused the claimants costs and damages, but gave the captors their expenses. In giving judgment he said: "It is impossible for the Court to throw out of its consideration, that when these Orders in Council are issued, it is the duty of the officers of His Majesty's Navy to carry them into effect; and although they may be of a nature to require a great deal of attentive consideration, gentlemen of the Navy are called upon to act with promptitude, and to construe them as well as they can under the circumstances of cases suddenly arising. With every wish, therefore, to make the greatest allowance for the difficulties which are at present imposed on the commerce of the world, I cannot in this instance refuse the captors their expenses; but in no future case, arising on the same state of facts, will the Court grant that indulgence."

In *The Acteon* (1), five years later, Sir William Scott, without referring to his former decision in *The Luna* (2), which does not appear to have been quoted to him, laid down what seems to be a different rule. He says: "Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the person to whom the property belongs must not be a sufferer." (1)

These cases are reviewed at length in *The Ostsee* (3), and it is said in the judgment that in *The Luna* (2) Lord Stowell

(1) 2 Dods. 48, 52. (2) Edw. 190.
(3) 9 Moo. P. C. 150.

J. C. 1920 THE BERNISSE. THE ELVE.

must have felt that he was going to the very verge of the law. The headnote to the report of *The Ostsee* (1) in Moore's Report states as part of the decision and not as a dictum that an honest mistake occasioned by an act of government will not relieve captors from liability to compensate a neutral; but it should be noted that towards the end of the judgment delivered by Lord Kingsdown he points out that in the case then before the Board there was no point of law. In strictness, therefore, what was said as to the insufficiency of a mistake in point of law might be considered as obiter. Their Lordships, however, consider that the judgment in *The Ostsee* (1) must be looked at as a whole, and that it really does decide the point stated in the headnote. It is not necessary to say that in order to relieve the captors from paying damages the neutral owner must be in some way in fault; it may be only his misfortune; but there must be something "connected with the ship or cargo" in order to give rise to the suspicion which will relieve. Here the doubt which certainly was honestly entertained was not a doubt as to anything so connected, but merely a doubt as to the meaning of an Order in Council issued by the British Government. If the decision in *The Luna* (2) proceeded entirely on the ground stated in the judgment as reported, it is contrary not only to *The Ostsee* (1) but to the judgment of Lord Stowell himself in *The Acteon* (3), and it cannot now be followed. It may well be that in addition to the point stated in the judgment in *The Luna* (2) as reported, and which is, as Lord Stowell truly said, a point which ought not to be left out of consideration, there were also in the facts of that case circumstances connected with the ship which were in Lord Stowell's mind. It is clear on the face of the report that the whole judgment is not reported. Even if San Sebastian was not in strictness a blockaded port under the Order in Council, nevertheless a ship going there was obviously taking goods to the enemy, who were in actual occupation of it, and on that or some other ground, in addition

(1) 9 Moo. P. C. 150. (2) Edw. 190.
(3) 2 Dods. 48.

J. C. 1920 THE BERNISSE. THE ELVE.

to what appears in the judgment, the decision may have been justified. It has, however, been treated as a decision that the facts referred to in the judgment as matters to be taken into consideration would in themselves be sufficient, and so understood it is contrary to at least one decision binding on this Board. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Treasury Solicitor.*
Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*

[PRIVY COUNCIL.]

THE OSCAR II. (No. 2.)

J. C.* 1921 Jan. 25.

Prize Court—Enemy Property—Sale to Neutral after Order for Detention—Rights of Purchaser under Peace Treaty—Treaty of Versailles, art. 297 (*b*) *—Order in Council of March* 11, 1915.

Under the reprisals Order in Council of March 11, 1915, non-contraband goods which were enemy property might be detained or sold, and if sold the proceeds were to remain in Court until the conclusion of peace or further order.

By art. 297 (b) of the Treaty of Peace signed at Versailles the German Government ceded the right to retain and liquidate property in British or allied territory which at the coming into force of the Treaty belonged to German nationals:—

Held, that goods which after their seizure in prize had been purchased by a neutral from their German owner, and which were ordered to be detained under the Order in Council, were not liable to be retained under the Treaty of Peace, and that the neutral purchaser was entitled to an order for the payment out to him of money which he had deposited as a condition to their release.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize) dated May 11, 1920. (1)

The Procurator-General appealed against a judgment of the President (Lord Sterndale), whereby it was ordered that

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 363.

J. C. 1921 — THE OSCAR II. (No. 2.)

a sum of 3639*l.* 10*s.* 11*d.* should be paid out of Court to the respondent.

The facts appear from the judgment of their Lordships.

1920. Nov. 5, 8. *James Wylie* (*Sir Gordon Hewart A.-G.* with him) for the appellant. It was not established that the respondent bought the goods, or that Lindberg could transfer the property in them to him. If he bought the goods he did so knowing that they were subject to prize proceedings, and he obtained no better title than Lindberg or Rasmussen. The proceeds of the sale are in the same position as the goods themselves. Under art. 297 (b) of the Treaty of Peace the Crown had the right to retain and liquidate the goods as being German property within British territory. An enemy owner whose goods have been detained under the Order in Council of March 11, 1915, has not power by a sale to a neutral after the seizure to free the goods from the liability to be dealt with under the Treaty.

Balloch for the respondent was not called upon.

1921. Jan. 25. The judgment of their Lordships was delivered by

LORD PARMOOR. The respondent in this case trades under the firm name of Joergen Jensens Successors, Copenhagen. In March, 1917, he bought, from Knud Rasmussen, of the firm of Levysohn and Rasmussen, Copenhagen, the bills of lading for a consignment of clover seed shipped at New York on a Danish ship, which sailed on or about December 4, 1915, from New York for Copenhagen. On the arrival of the ship at Kirkwall in December, the clover seed was seized as prize, but permission was given to take it to Copenhagen, on an undertaking, by the owner of the ship, that it would be returned to the United Kingdom for the purpose of being placed in the Prize Court. The respondent, on March 25, 1917, paid for the bills of lading kr. 42,335.20, and applied to the British Legation at Copenhagen for permission to have the goods delivered. It was made a condition that a sum of kr. 52,919.00 should be deposited, and thereupon the respondent

received delivery of the clover seed. The amount deposited was transmitted to the Admiralty Marshal, and paid into the Prize Court by him for adjudication. This is the sum of 3639*l.* 10*s.* 11*d.* now in dispute.

On January 11, 1918, by an amendment to a writ, which had been issued in February, 1916, the Procurator-General claimed condemnation of the clover seed as prize, or in the alternative, detention, under the reprisals Order of March 11, 1915. The cause came on for trial in March, 1919, when a claim was made on behalf of a firm in New York, Herbst Bros. & Co., who claimed as owners and shippers of the goods. The Procurator-General did not ask for the condemnation of the goods (or their proceeds) as contraband, but for an order of detention under the reprisals Order of March 11, 1915, on the ground that the goods had an enemy destination and were enemy property. The learned President, Lord Sterndale, decided that Herbst Bros. & Co. were acting as agents and intermediaries for the German firm of Ernst und von Spreckelsen, passing the goods through one Hermann Lindberg, and that they never really had the property in the goods. He accordingly pronounced the goods to have had an enemy destination, and to be enemy property, and ordered the proceeds of sale thereof to remain in Court until the end of the war or pending further order of Court. The only question which came before him for decision, and which he decided in his judgment, was that the goods when seized were enemy property. The respondent is not concerned to question this decision, and it does not affect the claim which he makes.

It is not disputed that the respondent purchased from an enemy. The purchase was honestly made, but subject to the risk of all belligerent rights, consequent on the seizure of the goods. The learned President states in his judgment that it had been made clear to him on the part of the appellant that it was not desired to defeat the claim on some collateral ground, but to have the question decided of the effect of the Treaty of Peace upon such a purchase as the respondent had made, and that he proposed to limit his judgment to

J. C. 1921 THE OSCAR II. (No. 2.)

that question, and to put aside all collateral questions which might conceivably have arisen. Having regard to this statement, it is not open to the appellant to raise collateral questions on the hearing of the appeal.

It was argued on behalf of the appellant that the decision of Lord Sterndale affected adversely the claim of the respondent. Their Lordships are unable to accept this contention. No doubt Lord Sterndale found that the goods at the time of seizure were enemy property, but they were not condemned as contraband, and the only order made was an order for detention of the proceeds of the sale of the goods until the end of the war, or pending further order of the Court. No question was raised at the hearing before Lord Sterndale as to the effect of a detention order in the case of goods which at the date of seizure were enemy property, but which had subsequently been transferred to a neutral.

It was further argued that the reprisals Order of March 11, 1915, operated to restrict the rights of the neutral purchaser in March, 1917. The relevant article of the reprisals Order provides that every merchant vessel sailing from a port, other than a German port, after March 1, 1915, having on board goods which are of enemy origin, or of enemy property, may be required to discharge such goods in a British or allied port. The steamship *Oscar II.* is a vessel within the terms of this article, and at the time of seizure was carrying goods of enemy property. The article proceeds: "Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may under the circumstances deem to be just. Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order."

In international law there is no rule which forbids the

purchase of goods by a neutral from an enemy after seizure by a belligerent. Such a purchase is no doubt subject to all rights which accrue to a belligerent as a consequence of the seizure. For instance, if the goods purchased by a neutral are condemned as prize in a Prize Court, this is a risk which a neutral must have known would attach to his purchase at the time when he made it, and defeats any right which he otherwise might have to claim the goods. On the other hand, if, apart from the operation of some special order such as the reprisals Order of March 11, 1915, the purchased goods are liberated by the Prize Court, the ownership of the neutral purchaser becomes effective, if, as is admitted in the present case, the transaction has been carried through by a bona fide transfer which in itself is not open to question, and which the appellant does not question.

In the present case the only special order which can in any way affect the claim of the respondent or restrict his rights is the reprisals Order of March 11, 1915. The question therefore arises, whether this reprisals Order operates to defeat the claim of the respondent to the proceeds of the goods. The order was passed alio intuitu. The object was to provide in specified cases for the detention of goods seized, or their proceeds, until the close of the war, in order to insure that, during the war, the enemy should not be benefited, either by obtaining possession of the goods, or of their proceeds. The order does not affect the ownership of property. It leaves the ownership just as it would have been if the order had not been passed. It does not purport to deprive a neutral purchaser of a right, to which he would otherwise be entitled, and which does not conflict with any belligerent right. There is not a word in the order which can be construed as depriving an enemy owner of the right which he otherwise would possess, to transfer the goods seized or their proceeds to a neutral purchaser, or as invalidating the title of the neutral purchaser. Whatever interest in the goods therefore Rasmussen possessed at the time of sale, as representing the owner of goods detained until the close of the war, passed under the terms of the purchase to the respondent; and the respondent, as a neutral

J. C. 1921 THE OSCAR II. (No. 2.)

purchaser, is entitled to claim payment of the proceeds of the goods after the close of the war, unless he is placed under a disability either by the terms of the Treaty of Versailles or of the Treaty of Peace Order of August 18, 1919.

If the effect of the reprisals Order of March 11, 1915, has been accurately stated, it is impossible to maintain that art. 297 of the Treaty of Versailles and the Treaty of Peace Order of August 18, 1919, can operate to defeat the claim of the respondent. Art. 297 reserves to the allied and associated Powers the right to retain and liquidate all property, rights, and interests belonging at the date of the coming into force of the Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions, and protectorates, including territories ceded to them by the Treaty. Germany undertakes to compensate its nationals in respect of the sale or retention of their property, rights or interests in allied or associated States.

The money claimed as proceeds of the sale of Alsyke clover did not belong to a German national at the date of the coming into force of the Treaty, but to a neutral. The contention on behalf of the appellant involves therefore a claim to confiscate, under the terms of the Treaty, property at that date vested in a neutral owner, a contention which is negatived by the words of limitation in the terms of the Treaty, and which is not capable of serious argument. The same limitation is to be found in the terms of the Treaty of Peace Order. The property charged under that order is all property, rights and interests belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith. It does not affect in any way property which at the date when the Treaty came into force was the property of a neutral.

The appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *Treasury Solicitor.*

Solicitors for respondents : *Botterell & Roche.*

[PRIVY COUNCIL.]

THE AXEL JOHNSON.

THE DROTTNING SOPHIA.

J. C.*
1921
Jan. 25.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Contraband—Enemy Destination—Wool to be combed in Enemy Country—Combed Wool to be returned to Neutral Country.

Wool (absolute contraband) consigned to the appellants, neutrals in Sweden, was seized in prize in May and June, 1916. The intention of the appellants was to send the wool to Germany to be combed under an arrangement whereby the combed or spun wool was to be returned to them in Sweden, the waste wool being retained in Germany :—

Held, without deciding whether there were any circumstances in which the temporary character of the stay of contraband goods in an enemy country would prevent them from being liable to condemnation, that as the process contemplated would have involved a considerable stay in the enemy country, and an alteration of the identity of the wool, it was properly condemned as having an enemy destination.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize). (1)

The appeal was by the claimants, a neutral firm in Sweden, against the condemnation, as having an enemy destination, of certain parcels of wool (absolute contraband). The facts appear from the judgment of their Lordships and the report of the proceedings before the President (Sir Samuel Evans).

1921. Jan. 24, 25. *Sir Erle Richards K.C.* and *Le Quesne* for the appellants.

Sir Ernest Pollock S.-G. and *T. Mathew* for the Procurator-General.

Jan. 25. The judgment of their Lordships was delivered by

LORD SUMNER. This appeal, with a very small exception to be mentioned shortly, raises only questions of fact, and

* *Present :* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1917] P. 234.

J. C. 1921 THE AXEL JOHNSON. THE DROTTNING SOPHIA.

after considering the evidence with care, and with the great assistance of counsel for the appellants, their Lordships have come to the conclusion that there is no reason to differ from the conclusions at which the learned President arrived. They do not consider it necessary to review all the steps by which he reached that conclusion, nor do they affirm their own agreement with all the propositions of fact that he mentions in his judgment, but not only do they think that there was evidence upon which he could conclude that the wool in question had a German destination, and being absolute contraband would therefore be condemned, but, for reasons to be shortly given, they have arrived at the same conclusion themselves. It seems to them clear that, as regards the wool purchased from Messrs. Staudt, there was an intention on the part of the claimants, clearly arrived at in November of 1915, that it should be sent to Germany or Austria to be combed. It is quite true that a purchase from Messrs. Hardt had taken place earlier, and no such letters had passed with Messrs. Hardt as passed in the case of Messrs. Staudt, but the way in which the matter is dealt with by Mr. Engberg draws no sufficient difference between the two consignments, and there is no reason except his statement to suppose that the intention formed with regard to Messrs. Staudt's wool did not equally apply, as naturally it would under the circumstances, to the wool purchased from Messrs. Hardt.

The intention is clearly proved, because the action taken by the appellants in increasing the quantity, which they purchased upon the direct suggestion of Messrs. Staudt, is consistent only with their making provision for what was represented to them as a satisfactory commercial transaction —namely, sending their wool to Germany to be combed upon the understanding that certain waste portions of it, which would be retained, would be paid for. There are circumstances spoken to by Mr. Engberg, which shortly before the seizure of the two consignments might have explained a change of intention, but their Lordships think that his account of the letter, and the transaction with Messrs. Staudt, if not uncandid—for probably he endeavoured to be candid—

was at any rate an understatement of his firm's position, and, on closely examining the reasons he gives for saying that no such intention existed at the time of the seizure, their Lordships are unable to suppose that the intention had been changed. There were no doubt some facilities for having wool combed in Sweden, which had previously not existed, and there is an arrangement with the Norrkoping Company made by the appellant company for availing themselves of those facilities, but the affidavits dispose rather too summarily of the suggestion that it would still have suited the appellants' business to carry out their former intention of sending the wool to Germany to be combed. Although it is possible that the appellants' business might have been carried on without sending the wool to Germany, one would have expected much more detail and much more firm ground in the affidavit before concluding that what had been a satisfactory arrangement in November had been abandoned in May or June of the following year. If that is so, the conclusion follows that at the time when the wool was seized on both vessels those who were the owners of it—and their Lordships think the appellant company were the owners—and who certainly had full control over it, intended for the purpose of their business, and not in any way wrongly, to send it to Germany to be combed, and part of it to be retained.

So much for the question of fact. It is then suggested that on two points the wool, which on those facts would be absolute contraband, would not be subject to seizure, because first of all it was intended to be sent to Germany for a temporary purpose only, and secondly because, as is contended, it was to be sent to Germany for the purpose of being returned to Sweden after treatment, under such a binding engagement between the German Government and the Swedish Government as would constitute a clog upon the German Government's power to requisition or detain it, and would ensure that it would never augment the resources of the enemy or form part of the German stock of wool.

It is to be observed with regard to the first point that we

J. C. 1921 — THE AXEL JOHNSON. — THE DROTTNING SOPHIA.

do not know how long the combing of the wool would involve its remaining in Germany, but it is clear that it is a process of some elaboration and some time. It would involve unbaling it, passing it through the combing machinery, and repacking both the combed wool and the waste wool, and therefore, although it might be a temporary matter in the sense that some wool was ultimately to be returned, it is not a question of mere passing through the enemy country, or of a sojourn clearly shown to be unimportant or short. Their Lordships do not feel called upon to decide one way or the other whether there are any circumstances in which the temporary character of the stay of the supposed contraband goods in the enemy country would prevent the goods from being contraband, and would therefore deprive a belligerent of the right to seize them, but they are clearly of opinion—and no authority whatever was cited to the contrary—that, where wool is to be sent into the enemy's territory for treatment like this, during a considerable stay, and with no small amount of alteration of identity, it is impossible to say that the temporary character of the proceeding, such as it is, distinguishes the case from that of goods permanently sent into enemy territory with the intention that they should there remain or be consumed.

With regard to the other question, whether such an international agreement as is suggested would of itself prevent goods, which were otherwise condemnable as contraband, from being condemned, upon the ground that faith must be given to the solemn promise of the other belligerent, and therefore that the goods are not going to augment his stock—it is unnecessary to express any opinion, because the facts do not raise it. On a close examination of the affidavit of the one deponent, who speaks to this matter, it is clear that, although the Swedish Government at the time in question required that the Swedish exporter should, as a condition of obtaining a licence to export, give his promise to bring the wool back, there was no proof of a promise on the part of the German Government either to the Government of Sweden or to the individual Swedish exporters to ensure

J. C. 1921 THE AXEL JOHNSON. THE DROTTNING SOPHIA.

this return. The evidence as to the German Government's arrangements stops short with that given by Messrs. Staudt in November of 1915, the gist of which was that the German Government would only insist upon the retention of the waste wool, and even this was to be without engagement, and as a matter of what is called "exceptional obligingness."

Their Lordships therefore think that on these grounds, which have been sufficiently outlined and need not be further developed, the conclusion at which the learned President has arrived was the right conclusion and is justified by the evidence. They will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Botterell & Roche.*
Solicitor for Procurator-General : *Treasury Solicitor.*

[PRIVY COUNCIL.]

THE VALERIA.

J. C.* 1920 Jan. 25.

Prize Court—Neutral Territorial Waters—Capture of Enemy Ship—Good Faith—Subsequent Loss of Ship—Claim by neutral State.

A German ship was captured by a British warship a short distance within Norwegian territorial waters. The capture was made in the belief, held bona fide and without negligence, that the ship was outside the three-mile limit. In bringing the prize back to a British port it became necessary owing to bad weather to abandon her; as she would have been a danger to navigation as a derelict she was sunk by gunfire. The Norwegian Government claimed the restitution of her value :—

Held, that though the ship would have had to be restored to the claimants if she had been afloat, the claim to her value could not be maintained.

The Düsseldorf [1920] A. C. 1034 distinguished.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize) delivered on January 14, 1920. (1)

* *Present :* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 81.

J. C. 1920 THE VALERIA.

The judgment appealed from rejected a claim made by the present appellant, on behalf of the Norwegian Government, to the value of the German steamship *Valeria* which had been captured within Norwegian territorial waters and subsequently lost. The facts appear from the judgment of their Lordships.

1920. Oct. 29; Nov. 1. *Sir John Simon K.C.*, *Aspinall K.C.* and *Balloch* for the appellant. If the ship had existed in specie the Norwegian Government would have been entitled to have her handed over to them: *The Düsseldorf.* (1) The decision in that case shows that the principle to be applied is restitutio in integrum, consequently the ship being lost her value must be paid. A claim based on a violation of neutral waters is of a higher nature than an ordinary claim in prize, the violation "overrules every other consideration": *The Vrow Anna Catharina* (2), quoted in *The Düsseldorf* (3); *The De Fortuyn.* (4) The claim should be allowed according to the principles of restitutio in integrum as applied in the Admiralty Division: *The Argentino.* (5) The President relied on *The Betsey* (6) and *The John* (7), but those cases did not relate to a "claim of territory." The latter case, if applicable, supports the claim, because, adopting the distinction there drawn by Lord Stowell, the seizure was due to "vincible" ignorance. *The Hendrick and Jacob* (8) (referred to in *The Betsey* (9) and *The Acteon* (10) show that restitution includes compensation where the vessel has been lost. There is nothing in the decisions with regard to claims of territory conflicting with the claim. [*The Twee Gebroeders* (11) and *The Anna* (12) were also referred to.] (13)

(1) [1920] A. C. 1034.
(2) (1803) 5 C. Rob. 15, 16.
(3) [1920] A. C. 1034, 1039.
(4) (1760) 1 Burrell, 175.
(5) (1888) 13 P. D. 191, 196.
(6) (1798) 1 C. Rob. 93.
(7) (1818) 2 Dods. 336.
(8) (1790) Lords of Appeal; unreported.
(9) 1 C. Rob. 93, 96.
(10) (1815) 2 Dods. 48.
(11) (1800) 3 C. Rob. 162.
(12) (1805) 5 C. Rob. 373.
(13) It was agreed that any question as to the rights of the Crown under art. 297 (b) of the Treaty of Versailles should stand over.

Dunlop K.C. (*Sir Gordon Hewart A.-G.* with him) for the Procurator-General. In *The Düsseldorf* (1) the principle of restitutio in integrum was applied merely to determine the rights of the neutral Government when the ship exists. Neither that decision nor any of the cases with regard to claims of territory support the present claim. A claim to recover the value in effect is a claim to damages; moreover it is a claim on behalf of the enemy owner and cannot be sustained: *The Pellworm.* (2)

Aspinall K.C. replied.

1921. Jan. 25. The judgment of their Lordships was delivered by

LORD SUMNER. This is a "claim of territory" made by the appellant on behalf of His Majesty the King of Norway. It is preferred in a cause in prize instituted by the Procurator-General in order that all outstanding questions as to the *Valeria* might be disposed of. On March 19, 1918, H.M.S. *Glendale* captured the *Valeria*, a German vessel, about fifty yards within the limits of the territorial waters of Norway. The captors had no intention of intruding on those waters and believed, though erroneously, that they were outside of them, nor was their mistake due to negligence or rashness. The *Glendale* proceeded to escort the *Valeria* towards Lerwick, but encountered very bad weather, and had to take the officers and crew off the prize and to abandon her. As a derelict she would have been a danger to navigation and she was properly sunk by gunfire. This is common ground between the parties to the appeal. It must be taken that the ship was lost by natural causes, and not by the conduct of the captors, though she was sailing under their direction. The personal claim of the Norwegian pilots is to be dealt with elsewhere and is not now in dispute. Accordingly the sole question raised is one of law.

The appellant's case is that, having done wrong in seizing the ship, the captors ought to restore her in specie; as they cannot do that they must restore her in money. This involves

(1) [1920] A. C. 1034. (2) [1920] P. 347.

J. C. 1920 THE VALERIA.

the proposition that, having seized her in neutral territorial waters, they became insurers of her against all risks and in all events whatsoever for the benefit of the neutral Sovereign. The appellant's counsel did not shrink from putting this case.

Both authority and principle were appealed to. For the former *The Düsseldorf* (1) was relied on. In that case their Lordships observed: "Simple release of the ship in this country to the claimant Sovereign may be an inadequate redress. The fact that the Court has duly received into its charge and jurisdiction a ship, which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant" (who was the same official as the appellant in the present case) "is for a restitutio in integrum, so far as the Government of Norway is concerned."

From this the conclusion was drawn that restitutio in integrum involved the payment of money, in case of the fortuitous loss of the ship. Their Lordships do not agree. No such consideration arose in *The Düsseldorf*. (1) There the ship existed in specie and the right of the claimants to her release was uncontested. What was in debate was whether it was sufficient to place the ship at the disposal of the Norwegian Government in a British port, or whether, as the equivalent of returning her to the waters from which she had been taken, the cost of transporting her from England to Norway should be paid. If this were not done, however venial and trivial the captors' original error might have been, the Government of Norway might be put to unmerited inconvenience and expense by reason of an act of which they had the right to complain. This was the connection in which the expression restitutio in integrum was used. The case had no analogy to the technical restitutio in integrum of Roman law, nor to the measure of damages for injury to property, wilfully or carelessly inflicted, nor were such matters considered. The plain fact is that no money can restore this ship and to claim money, with which to buy another ship, or as a solatium for her loss, is to shift the ground of the claim from restitution to reparation.

(1) [1920] A. C. 1034, 1038.

The judgment in *The Düsseldorf* (1) further observed: "It may therefore well be that the rules which apply to capture on the high seas are by no means closely applicable to capture in neutral territorial waters." One of such rules, apart from questions of probable cause for the original seizure, is that the Court does not hold captors liable for damages and costs, where their dealings with the prize have been reasonable and prudent and where, if she has been lost, it has not been through their neglect or default. The passage above quoted does not imply that, in case of a claim of territory the exact opposite must be the rule, and that the captors must be decreed to pay for the ship, if, however excusably, they are unable to produce and return her. Their Lordships find in the language used in *The Düsseldorf* (2) no warrant for the present contention.

Although this matter arises virtually, if not formally, between Sovereign and Sovereign, their Lordships, as a Court, are bound to act judicially. It may be right that such claims should be encouraged, so that all sense of grievance in neutral Sovereigns may be peacefully and regularly removed, but their Lordships, however disposed to the fullest liberality of treatment, must be guided by settled rules and decisions. Anything in excess of this must be sought, if at all, through diplomatic channels. The Government of Norway had no property or interest in this ship; they had no possession of her nor, so far as appears, have they come under any liability or incurred any expenses, other than costs, in respect of her capture. Alike in vindication of their Sovereign's territorial right and of his high obligations of impartiality as a neutral in time of war, they claim on his behalf that the steps which the captors took should be retraced, that what was done should be undone, and that the belligerent should retain no advantage from the captor's mistaken action. This is His Norwegian Majesty's right, but compensation in money for the loss of the ship under circumstances such as these can only be asserted in the interest of the owners of the vessel. It is not as though Great Britain had profited by what

(1) [1920] A. C. 1034, 1038. (2) [1920] A. C. 1034.

J. C. 1920 THE VALERIA.

happened. If the Norwegian Government be really entitled to recover money, no one is entitled to inquire into the use to which they may choose to put it; but, for the purpose of testing the right, it is germane to ask in what title that money would be recovered. Even though it is measured and described as the value of the vessel, it is money still, and would be recovered only on behalf of the German shipowners, who have no rights in the matter. The appellant conceded that the decision in *The Düsseldorf* (1) precluded any claim for damages, as such, in a case where the captors were not guilty of any intentional offence or of any negligence or want of skill, and, in this case, between restoration and damages there is no middle term. It is argued that, if so, in spite of the fact that within the territorial waters of Norway no capture should have been made at all, the claimant will under the circumstances of the case have no more redress than in the case of an honest but mistaken capture on the high seas. It may be so. In the latter case the claimant shipowner is met by the rights which attach to the captor's bona fide possession and can vindicate his ownership only by obtaining the release of the ship, unless the misconduct of the captors give him exceptionally a claim for costs and damages. In the former, the same result is reached by a different road. The rights of the territorial Sovereign, vindicating neither ownership nor possession but his claims of territory only, are satisfied in the absence of such misconduct by the restitution of the ship herself, in the sense and under the conditions laid down in *The Düsseldorf*. (1) He has, as a Sovereign, no alternative or additional claim to receive another ship or the means of buying one. If the ship had been neutral-owned, the owner could have made his claim directly and in his own name, and the Norwegian Government would have been independent claimants in another and separate right. From the fact that there was an enemy owner they can be no better off. In his own name the enemy owner cannot be heard, nor in his name or in his behalf can the Norwegian Government be heard either, but only on behalf of the Norwegian Crown.

(1) [1920] A. C. 1034.

It is unnecessary to re-examine the authorities generally, which were so recently discussed in *The Düsseldorf*. (1) In the case of *The De Fortuyn* (2) it may be pointed out that the violation of neutral waters was intentional, the claimant himself was before the Court in his own proprietary right, and the prize was apparently still existent in specie in the hands of the captors or of purchasers from them. It has therefore no bearing on the present appeal.

Two points, however, were made upon expressions to be found in the decided cases, which ought to be briefly considered. In *The John* (3) Lord Stowell distinguishes cases of unjustifiable seizures, which have been made in an ignorance which is "vincible," from those in which the ignorance is "invincible," and it is said that, at this point at least, decisions upon capture on the high seas ought to apply in favour of claims of territory, and the error of the present captors, being due to "vincible" ignorance, ought to be compensated with costs and damages, as if the capture had been on the high seas. The coast of Norway was fixed and three miles to seaward from that coast could have been fixed too. There was no uncertainty in the limits of the territorial waters, but only in the navigating officer's mind. He was ignorant of the fact of his precise position, not because it was doubtful but because he was. With better charts or better instruments his ignorance would have been vincible. Their Lordships think that this argument is a mere metaphysical subtlety. The invincible ignorance spoken of by Lord Stowell arises, at any rate, when a captor, making reasonable use of all the means of information at his disposal, is yet misled. He was discussing cases where it is impossible to tell from the ship's register, sea pass or bills of lading on board what her national character or what not may be. How is the proposition any less applicable when it is impossible with the ordinary charts and instruments to tell exactly how many scores of yards distant the shore may be? If there is no want of diligence and skill in using the instruments

(1) [1920] A. C. 1034. (2) 1 Burrell, 175.
(3) 2 Dods. 339.

J. C. 1920 THE VALERIA.

or other means of observation at their disposal officers are just as invincibly ignorant or the reverse when they investigate the geographical position as when they investigate the legal status of a ship under search. There seems therefore to be nothing in this distinction.

The other point arises out of the use of the word "indemnification" in *The Hendrick and Jacob* (1), decided in 1790 by the Lords of Appeal. It is relied on as deciding that a general rule exists, whereby captors, who have seized a vessel wrongfully, are bound to restore her in specie or, if they cannot do that, to indemnify in money those who suffered wrong by her capture.

Their Lordships have made extensive inquiries in order to ascertain whether any record exists of the reasons given by the Lords of Appeal in this case, but without success. Although collections are to be found, though by no means complete, of the printed papers laid before the Lords of Appeal by the parties in cases heard during the latter part of the eighteenth century, and in some case at least the original documents connected with the ship and cargo captured have been preserved in the Record Office, no note or report has been found of the reasons for the judgment, if any were given. They may well have turned on the facts of the case, for the captors alleged, and the claimants denied, that those on board avowed the ship's Dutch enemy nationality when challenged, and endeavoured to destroy some of the ship's papers. What is known of them is to be found in Sir W. Scott's judgment in *The Betsey* (2), and this account was probably taken from one of the MS. collections, formed by advocates practising in prize cases from time to time, and possibly from the notes of Sir W. Scott himself, as he signed the respondents' case on the appeal. The actual decree is thus indorsed on the appellant's case in the Library of Lincoln's Inn—"the Lords pronounced against the seizure and decreed the value to be paid to the claimants for the use of the owner."

The case is one of a vessel taken on the high seas without any justification. On demand for restitution by her owners

(1) Unreported. (2) 1 C. Rob. 93, 96.

against the original British captors the Lords of Appeal decided that the owners were entitled to restitution from some quarter and, as the ship had been lost when in the justifiable possession under prize of French recaptors, that quarter could only be the original British captors. The ship no longer existed in specie, so that it could be followed into French hands, and since that claim was absolutely extinguished by the loss, the proprietor was entitled to his indemnification from the original captor.

Without discussing this case, their Lordships need only point out that it is distinguishable. It was a case of capture on the high seas of a ship supposed to be an enemy but really a neutral ship, so that the only wrong was one to her owners, and that a wrong in respect of proprietary right. In the present case the capture was within territorial waters and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway. Whether indemnity be an apt term or not in the case of captures, it is at any rate plain that it is a term which would preclude the appellant from recovering anything in respect of the proprietary interest in the ship. Restitution of the vessel is a restoration of the status quo, but payment of her value in money would either leave in the hands of the Norwegian Government a profit on the whole transaction, which is a contradiction of the whole idea of indemnity, or would constitute them agents or trustees for the German owners, who on receipt of the money would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from.

Their Lordships are, therefore, of opinion that the appeal fails, and should be dismissed with costs, and so they will humbly advise His Majesty.

Solicitors for appellant : *Waltons & Co.*
Solicitor for respondent : *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1920 Dec. 17.

THE KRONPRINSESSAN MARGARETA, THE PARANA, AND OTHER SHIPS.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Contraband—Doctrine of Infection—Passing of Property—Revocation of Order in Council of October 29, 1914—Order in Council of March 30, 1916—Declaration of Paris.

The law of prize contains a long established rule (known as the doctrine of infection) which condemns as if contraband, goods which, though not condemnable themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. In applying this rule effect must be given to the further rule of prize, also long established, which refuses to recognize transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods. In applying the doctrine of infection to the ownership of the goods at the date of capture, and not the control of them, is the test. The doctrine does not rest upon the personal culpability or complicity of the owner to whose goods it is applied, and is applicable although he is not privy to the contraband enterprise. "Infected" goods in a neutral ship are not protected from condemnation by the Declaration of Paris.

Consequently, where goods shipped by an enemy upon a neutral ship are liable to condemnation as having an enemy destination, and in the same ship (*Kronprinsessan Margareta*, first voyage) there are other goods purchased by a neutral from the enemy shipper, either after shipment, or before shipment upon f.o.b. terms payment against bill of lading, but the bill of lading has not been taken up until after the capture of the goods, then the purchased goods are liable to condemnation. The same result follows where (as in the case of the *Parana*) the goods have been purchased before shipment and are deliverable by the bill of lading to the purchaser, who has himself effected the insurance, but drafts drawn for the cost and freight price upon a confirmed bank credit established by the purchaser under the terms of the contract are not paid until after the capture. It cannot be inferred from these circumstances that the intention was that the property should pass before shipment.

The Declaration of London Order in Council No. 2, 1914 (October 29, 1914), was revoked by the Declaration of London Order in Council, 1916 (March 30, 1916), from the date of the latter Order, even if that Order had not a retrospective effect.

Judgments of the Prize Court affirmed subject to a slight modification on the facts.

---

* *Present:* LORD SUMNER, LORD PARMOOR, SIR ARTHUR CHANNELL, and SIR HENRY DUKE.

APPEALS from judgments of the Admiralty Division (in Prize), dated March 14, 1917 (1), May 22, 1919, and May 27, 1919. (2)

The appeals, which were heard together, were by neutral claimants of various parcels of conditional contraband goods shipped from South American to Swedish ports in the neutral steamships *Kronprinsessan Margareta* (two voyages by that ship being in question), *Parana*, *Rena*, and *Hilding*. The goods had in each case been condemned upon the ground that they belonged at the date of capture to an owner who owned other goods upon the same ship which goods were liable to condemnation as having an ultimate enemy destination. The appeals raised questions with regard to the application of that principle known as the doctrine of infection, and more particularly whether in applying that doctrine effect should be given to the rule of prize law that an enemy cannot transfer goods afloat to a neutral by a merely documentary transfer. With regard to the goods captured in the *Parana*, *Rena*, and *Kronprinsessan Margareta* (second voyage), there was also a question of mixed law and fact whether the property passed to the appellants before shipment. The goods had been purchased before shipment at a price including cost and freight, upon the terms that the purchasers should open a confirmed bank credit in Sweden upon which the enemy seller could draw, and the goods had been shipped under bills of lading making them deliverable to the order of the purchasers, who themselves effected insurances in Europe. In the case of the second voyage of the *Kronprinsessan Margareta* there arose a further question—namely, whether the Declaration of London Order in Council No. 2, of October 29, 1914, which provides that conditional contraband goods consigned to a neutral port are not liable to condemnation if the consignee is named in the shipping documents, was or was not revoked by the Order in Council of March 30, 1916.

The material facts with regard to the several parcels of goods claimed appear from the judgment of their Lordships.

(1) [1917] P. 114. (2) [1919] P. 249.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

1920. June 8, 10, 11, 14. *Sir Erle Richards K.C.* and *R. A. Wright K.C.* (*Balloch* and *Sir Robert Aske* with them) for the several appellants. It was admitted that none of the goods now in question had an enemy destination, and that the appellants had no connection with or knowledge of the respective contraband parcels which were held to have "infected" their goods. There is no authority for applying the doctrine of infection where the effect is to penalise an innocent neutral owner. Previously to the decisions now under appeal (1), the first of which was followed in *The Posteiro* (2) and *The Antwerpen* (3), the principle under which the Prize Court refuses to recognize documentary transfers of goods afloat from an enemy to a neutral had never been applied so as to result in the condemnation of innocent goods by infection. That result is not within the principle upon which the doctrine of infection is founded—namely, the punishing of those who have shipped contraband goods: Zouch, "Juris et Judicii Fecialis" (1651), pt. 2, s. 8, question 13; Bynkershoek, "Quaestiones Juris Publici," bk. 1, ch. 12; *The Staadt Embden* (4); *The Sarah Christina* (5); *The Frederick Molke* (6); *The Oster Risoer* (7); *The Neptunus* (8); *The Atalanta* (9); *The Peterhoff* (10); *The Hsiping* (11); *The Pehping* (12); *The Bawtry* (13); *The Paros* (14); *The Lydia.* (15) The rule with regard to transfer of goods afloat applies only to prevent enemy goods being transformed into neutral goods; further it does not apply to goods transferred under a contract of sale made before shipment: *The Packet de Bilboa* (16); *The Danckebaar Africaan* (17); *The Vrow Margaretha* (18); *The Jan Frederick* (19); *The Baltica.* (20) It is inconvenient and inequitable

(1) [1917] P. 114; [1919] P. 249.
(2) (1917) 3 Br. & Col. P. C. 275.
(3) [1919] P. 252*n*.
(4) (1798) 1 C. Rob. 26.
(5) (1799) 1 C. Rob. 237, 242.
(6) (1798) 1 C. Rob. 86.
(7) (1802) 4 C. Rob. 199.
(8) (1807) 6 C. Rob. 403.
(9) (1808) 6 C. Rob. 440, 460.
(10) (1866) 5 Wall. 28, 59.
(11) (1904) 2 Russ. & Jap. P. C. 140.
(12) (1904) Ibid. 162.
(13) (1905) Ibid. 265.
(14) (1905) Ibid. 301.
(15) (1905) Ibid. 367.
(16) (1799) 2 C. Rob. 133.
(17) (1798) 1 C. Rob. 107.
(18) (1799) 1 C. Rob. 336.
(19) (1804) 5 C. Rob. 127.
(20) (1857) 11 Moo. P. C. 141.

to apply the two rules in conjunction having regard to modern mercantile machinery; it is now a common practice to send shipping documents by a ship to arrive before the goods do so. Infection does not really depend upon identity of property in, but upon identity of control over, the two parcels; analogies are to be found in *The Louisiana* (1) and *The Hamborn.* (2) Goods are not liable to condemnation where an owner ships them intending an enemy destination but before their capture abandons that intention: *The Alwina.* (3) Infection therefore cannot depend upon the ownership of the two parcels at shipment; before capture one parcel may lose its contraband character, similarly the other may change its ownership. Further, the rule against transfers of goods afloat does not apply to goods in neutral ships since the Declaration of Paris, art. 2; this argument is supported by art. 60 of the Declaration of London, which expressly refers to goods in enemy ships only.

The goods in the *Parana*, the *Rena*, and the *Kronprinsessan Margareta* (second voyage) were in each case sold before shipment for a c. and f. price which under the terms of the contract was provided for by a confirmed bank credit, the purchasers themselves effected the insurances in Europe, and the bills of lading made the goods deliverable to the purchasers' order. Under these circumstances the property in the goods passed to the purchasers before shipment: Sale of Goods Act, 1893, s. 18, r. 5, and s. 19; *The Parchim* (4); *The Prinz Adalbert* (5); *Ex parte Banner.* (6) These goods were therefore not infected even if the rule against transfers of goods afloat applies.

The goods in the *Kronprinsessan Margareta* (second voyage) which were held to have infected the goods claimed by Bergman and Bergstrand were shipped under bills of lading in which the consignees were named. They were consequently exempt from condemnation by the Order in Council of

(1) [1918] A. C. 461.
(2) [1919] A. C. 993.
(3) [1916] P. 131, 141.
(4) [1918] A. C. 157.
(5) [1917] A. C. 586.
(6) (1876) 2 Ch. D. 278, 288.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

October 29, 1914, whether or not they had an enemy destination: *The Kronprinzessin Victoria.* (1) The Order in Council of March 30, 1916, upon its true construction did not revoke that of October 29, 1914; that Order was not revoked until the issue of the Order in Council of July 7, 1916, which was after the capture of the goods.

Sir Gordon Hewart A.-G. and *Sir Ernest Pollock S.-G.* (*Bevan K.C., Wylie, Clement Davies,* and *Hubert Hull* with them) for the respondent, the Procurator-General. The rule that goods not in themselves confiscable became liable to condemnation if they belong to the owner of goods shipped in the same ship and liable to condemnation as contraband was well established by the beginning of the Revolutionary wars. It is important to observe that the rule was a mitigation of the older practice under which the carriage of contraband worked the condemnation of the vessel and its entire cargo: *The Ringende Jacob* (2); *The Mercurius* (3); *The Jonge Tobias* (4); *The Franklin* (5); *The Minerva* (6); *The Neutralitet* (7); the last-named case was referred to with approval in *The Hakan.* (8)

[With regard to the early history of the rule reference was made to: Zouch, Juris et Judicii Fecialis (1651), pt. 2, s. 8, questions 6, 13 (the author being judge of the Admiralty Court in 1641); Bynkershoek, Quaestiones Juris Publici, bk. 1, ch. 12; and the Treaty of Utrecht, 1713, art. 26; for its application reference was made to the following cases (in addition to those referred to for the appellants): *The Jonge Margaretha* (9); *The Immanuel* (10); *The Charlotte* (11); *The Richmond* (12); *The Eleonora Whilelmina* (13); *The Margaret* (14); and the following text-books: Dana's Wheaton (1865), paras. 443, 505; Lee on Captures (1803), ch. 13; Manning, International Law, 2nd ed., p. 381; Phillimore, International Law, 2nd ed., vol. iii., p. 462.]

(1) [1919] A. C. 261.
(2) (1798) 1 C. Rob. 89.
(3) (1799) 1 C. Rob. 288*n.*
(4) (1799) 1 C. Rob. 329.
(5) (1801) 3 C. Rob. 217.
(6) (1801) 3 C. Rob. 229.
(7) (1801) 3 C. Rob. 295.
(8) [1918] A. C. 148, 152.
(9) (1799) 1 C. Rob. 188.
(10) (1799) 2 C. Rob. 186.
(11) (1804) 5 C. Rob. 275.
(12) (1804) 5 C. Rob. 325.
(13) (1807) 6 C. Rob. 331.
(14) (1810) 1 Acton, 333.

In the application of the doctrine of infection the Prize Court does not recognize a transfer of contraband which takes place in transitu. In *The Baltica* (1) it was the national character of the transferred goods which was in question, but the principle laid down in that and numerous other cases (see *The Daksa* (2)) applies in considering the rule of infection. It is conceded that there is no reported case before the late war in which the rules have been applied in conjunction, but there is no case to the contrary. If a transfer can be made in transitu the rights of a belligerent could easily be defeated, and the Prize Court would be involved in difficult investigations. The Declaration of Paris has no bearing upon the question of infection; the effect of art. 2 is merely that enemy goods in a neutral ship are not liable to condemnation because they are enemy goods.

The Order in Council of March 30, 1916, upon its true construction revokes the Order of October 29, 1914. In *The Kronprinzessin Victoria* (3) the capture was in August, 1915, the question therefore did not there arise.

The property in the goods claimed in the *Parana*, the *Rena*, and the *Kronprinsessan Margareta* did not pass before shipment. The intention was that the property should not pass until the contract price was paid: *Moakes* v. *Nicolson* (4); *Shepherd* v. *Harrison*. (5) The effect in that respect of a confirmed bank credit was considered in *The Annie Johnson*. (6)

R. A. Wright K.C. replied.

Dec. 17. The judgment of their Lordships was delivered by

LORD SUMNER. These appeals are brought to test the validity of the doctrine of "infection" and its applicability to the conditions and forms of overseas commerce at the present time, and their Lordships think it right to deal with them accordingly, although, as will appear, they, or at any rate some of them, might have been disposed of on narrower grounds. They relate to four ships, the *Hilding*, the *Parana*,

(1) 11 Moo. P. C. 141, 149.
(2) [1917] A. C. 386.
(3) [1919] A. C. 261.
(4) (1865) 19 C. B. (N. S.) 290.
(5) (1871) L. R. 7 H. L. 116.
(6) [1918] P. 154, 159.

J. C. 1920

THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

the *Rena*, and the *Kronprinsessan Margareta*, and to five voyages, there being two of the ship last named.

The claimants are neutrals, who acquired the titles on which they rely in the ordinary way of trade. The goods condemned were coffee and hog products, which are in themselves conditional contraband, and they were carried in neutral bottoms under the protection of neutral flags and were shipped from and deliverable at ports in neutral countries. None of them were shown to have had an ulterior enemy destination, nor was it shown that any of the claimants themselves were privy to the ulterior destination of any of the cargo carried in the same vessels, but in each case there was other cargo, which was in itself conditional contraband and was found to have an ulterior enemy destination, and it is by this that the goods in question have been held to be infected.

The case of the *Hilding* is mainly one of fact, and will be stated later. In the case of the *Parana*, neutral shippers, acting through agents, shipped sundry parcels of coffee belonging to them, of which one had an ulterior enemy destination, as the President found and as the appellants now accept, and others were consigned to the appellants, Messrs. Lundgren & Rollven, in pursuance of contracts of sale and purchase made before the date of the bills of lading. The terms of the sale were c. and f. Stockholm, reimbursement by confirmed sight credit on a Swedish bank. The draft in respect of one shipment, that made at Santos, was met by the bank in Sweden before seizure; the draft drawn in respect of the other shipment, that made at Rio, was met after seizure. Both dates were long after the ship sailed from Santos and Rio respectively.

In the case of the *Rena*, Diebold & Co., a German firm trading in Brazil, had shipped sundry parcels of coffee, of which one, nominally consigned to Swedish consignees, but claimed on behalf of a Dutch firm, the Commanditaire Vennootschap Heybroek & Co. as purchasers, was held by the President to have belonged to Diebold & Co. at the time of the seizure and to have had an ulterior enemy destination at that time given by Heybroek & Co., and was accordingly

condemned. The present appellants, while not admitting these facts, to which indeed they appear not to have been privy, were not in a position to contest the President's findings and condemnation. This may have been their misfortune, but it cannot affect the case. They are a firm of Mattsson Peterzens & Co., consignees named in the bill of lading of another portion of the coffee pursuant to a contract of purchase and sale dated before the shipment, the terms of which were cost and freight Gothenburg, payment at sight on a Swedish bank, who confirmed the credit by telegram to Santos. The Swedish bank met this draft before the seizure but after the ship had sailed. This parcel of coffee was not shown to have had any ulterior enemy destination; on the contrary it was admitted to have been in itself the subject of a legitimate transaction.

In the case of the second voyage of the *Kronprinsessan Margareta*, the claimants and appellants are Messrs. Bergman & Bergstrand. Coffee was shipped by Diebold & Co., under a bill of lading dated May 8, 1916, consigned to Messrs. Dahlen & Wahlstedt. This parcel had in fact an ulterior enemy destination and the President condemned it as contraband, but it is contended that it was not liable to condemnation, and therefore not capable of infecting other goods in the same ship, as the Order in Council of October 29, 1914, respecting immunity from condemnation of conditional contraband, consigned to a named consignee at a neutral port of discharge, was still in force and applied to it. There is, therefore, here a question whether this immunity had or had not been revoked before June 15, 1916, the date of seizure. The appellants, Messrs. Bergman & Bergstrand, bought other parcels of coffee from Diebold & Co., under contracts effected before shipment, and were the consignees named in the bill of lading. Their coffee was only destined for Sweden. The terms of these contracts provided for payment by sight reimbursement credit on a Swedish bank, but the draft was not met until after the date of the seizure.

The remaining case, that of the first voyage of the *Kronprinsessan Margareta*, is rather more complicated. There are

J. C. 1920 THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

four claimants and appellants—Messrs. Engwall, Berg & Hallgren, Levander & Ofverstrom—all neutrals importing for neutral consumption only. An enemy firm, Goldtree, Liebes & Co., in Brazil, made shipments of coffee, of which, in addition to the parcels claimed as above, one was condemned by the President as having an ulterior enemy destination and as being the property of the shippers at the date of seizure. The appellants all bought their parcels under contracts made after shipment, except Levander. The terms of his contract were f.o.b. Acajutla, payment 90 per cent. against bill of lading and balance on delivery, but he, like the other appellants, did not take up the bill of lading and make any payment until after the date of the seizure. In all these cases the appellants were innocent and ignorant of the enemy destination of the infecting parcel.

It will be convenient to consider the nature of the rules impugned and the reasoning and authority on which they rest before dealing with the particular circumstances of the cases under appeal, especially as the application of these rules is complicated by the fact that the purported transfers of ownership have all been effected by transfers of documents representing the goods while afloat and by the fact that, in so far as the position of enemy transferors has to be considered, the appellants further invoke the Declaration of Paris.

For about one hundred and fifty years at least the law of prize has contained two settled rules, one which refuses to recognize transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods; and the other, which condemns as if contraband any goods which, though not condemnable in themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. It is strictly with owners that these rules deal, and although an owner is normally the person who has and exercises control over goods which belong to him, there is no warrant for saying that either rule refers to anything but ownership.

It is not the case that a neutral, who could not otherwise establish such ownership as the law will recognize, is entitled to be treated as if he had done so because he can show that he has by personal contract acquired a right to control the goods in certain events; nor is it the case that enemy ownership of goods, so associated with contraband as to become liable to confiscation, may be disregarded if the enemy ownership does not happen to be made active by the exercise of actual control, or if the enemy owner's contractual position has made him indifferent to the fate of his goods. Upon the authorities it is also clear that the above-mentioned refusal to recognize transfers does not apply when both transferor and transferee are neutral, apart from special circumstances affecting them, and that the common ownership, which involves goods, not in themselves contraband, in the condemnation of other goods which are condemned as contraband, is common ownership which subsists at the time of the seizure and has not previously been determined.

Their Lordships are fully aware that some Continental jurists have criticized the rule of infection adversely, and that Continental Prize Courts have not always accepted it, though it has long been adopted in the United States and more recently in Japan. They are, however, bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish. They would observe that, valuable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists. The history of this rule is obscure. A reference to some of the proclamations in Rymer's "Foedera" suggests that it may have had its origin in the practice followed by the executive during the seventeenth century in successive wars, and the theories on which writers like Zouch, Bynkershoek and Heineccius appear to proceed seem rather to have been an effort to find in their erudition some ex post facto

J. C. 1920 THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

warrant for an accepted rule than an historical statement of the reasons which actually guided those who laid it down. Sir William Scott found it well settled, and if he appears to take some credit to the Courts for mitigating the harshness of an older time, this points rather to the substitution of legal doctrines for executive practice than to the exercise of any assumed dispensing power by Courts of Prize.

That the so-called doctrine of infection does not really rest, in spite of many passages which suggest it, on the personal culpability or complicity of the owner of the goods is shown by the fact that, if it were so, excusable ignorance would be an answer, and for this there is no authority. The term is as old as the Treaty of Utrecht, but the doctrine is perhaps unfortunately named. From the figure which describes the goods as contaminated when seized, the mind passes to the analogy of a physical taint, which runs through the entire cargo in consequence of its being in one bottom, and begins on shipment or at least on sailing. Hence, "once infected always infected," is assumed to be the rule, and a buyer would get a tainted parcel, even though he became owner before seizure, and was recognized as such. This is inconsistent with the view that the rule is a penal rule, as it certainly has been said to be, but it is argued that the penal effect is only accidental and that the real foundation is the belligerent's right of capture, which may arise as soon as the ship gets out to sea. "Infection" has then attached to all the goods afloat in one common ownership, and to purge it by a subsequent transaction and transfer of ownership on land would be to defeat an accrued belligerent right.

This reasoning is answered as soon as it is appreciated that "infection"—that is, the liability of a particular owner to a derivative condemnation of his goods—is not a quality of the goods themselves, but is an incident of the owner's position, when the seizure is made and the captor's right arises. This consideration operates in two ways. It fixes the critical moment as the time of seizure and makes liability to condemnation depend on the facts as they are then found to be; but it also establishes that by those facts the claimant

must stand or fall. His liability is not in the nature of punishment, nor does it involve mens rea. It does not depend on his having formed or having abandoned an intention to send the goods in question to an ulterior enemy destination. The destination of the goods is a matter of fact, by whomsoever it is given, and, when transit to that destination is in progress, this may make the goods themselves absolute contraband. When once it is found that, at the time of the seizure, the same person was owner of goods on board and embarked in the same transaction or transit, of which the ulterior destination involved their condemnation, and of goods bound for a neutral port without any ulterior destination, neither the captor nor the Court is called on to investigate his mercantile operations as to these other parcels—an inquiry complex and remote, in which the claimant has all the information, and the captor all the disadvantage—but these goods also are involved in the condemnation.

Neutrals, however, must be taken to accept the consequences of the belligerent's legitimate exercise of all his recognized rights. If cargo has in fact such an ulterior destination as makes it liable to condemnation, that consequence follows independently of the actual owner's knowledge, intention or interest, for res perit domino. It is accordingly beside the mark to say that the appellants were innocent parties themselves; that they never interposed in the war; that, so far as they knew, all the goods with which they were concerned had a final neutral destination; that if their buyers had arranged otherwise it was unknown to them and unsuspected; that guilty shippers escape because they have been paid, and guilty sub-purchasers because the goods have been intercepted and they are not liable to pay, and that thus the penalty falls for the offence of others on the shoulders of the party who of all is the most innocent.

It has been contended that control and not ownership is the real test, so that either control, divorced from ownership, when vested in a neutral will avert condemnation, or bare ownership in an enemy, if devoid of control, will be so innocuous as to neutralize any infection. It may be doubted

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

if this point really arises. None of the appellants here had control, as distinguished from a contractual right to obtain control on taking up the documents and thereby becoming owner, and, unless in the cases of the *Rena* and the *Parana* the intention was to retain, if anything, only a lien by way of security and not the general property, none of the transferors were anything less than owners, who had contracted to give control and ownership as well, upon the due taking up of the documents.

In any case, however, there is a fallacy in the argument. In cases like *The Hamborn* (1), control is looked to instead of the mere persona, in which, according to municipal law, the ownership resides, because under the rules there applicable enemy character is the question and civil property is not. The rules now applicable adopt the test of ownership and not that of enemy character. They may be criticized or impugned on other grounds, but if they are recognized and the question is merely as to their application, they must be accepted as they stand.

It is objected that the rule "infects" goods, which are in themselves free from all objection, by reason of what has been done with other goods, over which the claimants had no control, and which in some cases received their enemy destination from consignees whose design was unknown even to the enemy shipper. The rule neither penalises nor deters the enemy shipper, especially if it is applied in cases where he has been fully paid. It only operates to pass what belongs to an innocent neutral into the pockets of the captors.

Though this kind of deterrent is not always of direct and obvious efficacy, few modes of deterring contraband trade are more effectual than to establish a rule, known by and applicable to all, that the inclusion by a shipper among his other shipments by the same vessel of one parcel having in fact an ulterior enemy destination may lead to the condemnation of the whole. On the other hand, the adoption of the date of the seizure is a great protection to the innocent neutral. Just as the general rule is that a ship is not open to

(1) [1919] A. C. 993.

proceedings merely for having carried contraband on a past voyage, so goods are liable to infection not because they formerly belonged to an owner of contraband, but because they are found to do so when the captor's inchoate title by seizure begins. If the common ownership existing before the seizure had then come to an end by means which are valid in prize, this liability does not arise ; if it continues till after the seizure a new and neutral owner, acquiring ownership only after seizure, though nothing forbids his acquiring title from a belligerent, can have no better right as against the legitimate captor than to stand in the shoes of the owner, from whom he derives title, as they were when the goods were seized, and he, by reason of his common ownership of both classes of goods, would have forfeited them all. At the time of the seizure the subsequent transferee has acquired no right to object, and, the goods having been legitimately brought into Court for condemnation, a claimant on a title not completed until after seizure must obtain them, if at all, only by the aid of the Court and only on the terms of accepting the law there administered as binding upon him.

The rule against recognizing transfers of enemy goods while at sea, if unaccompanied by actual delivery and transfer of possession, is so well established and is now so ancient that its authority cannot be questioned or its utility impugned for the purposes of a judicial determination. Its application assumes that the circumstances of the shipment, and the dealings with the shipping documents and otherwise, are not such as to make the shipment itself an actual delivery of the goods to the transferee through his agent the carrier. It assumes also that a documentary transfer has taken place in good faith by a real and not a sham transaction, and that in pursuance of that transfer rights have been acquired by the transferee, which in other Courts not bound by such a rule would be valid and enforceable. With sham transactions Courts of Prize would deal in another fashion ; with incomplete transactions insufficient to transfer rights, no Court would deal at all. The expression " mere paper transaction," sometimes used, does not imply that something unreal or

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

ineffectual in itself is under discussion. It serves to draw attention to the fact that the transaction is unaccompanied by any dealing with the goods themselves, such as by its overt or notorious character would serve to inform the captor as to the subject which he seizes and the nature of the right, if any, which he may be entitled to acquire in consequence. The history and the theory of the rule, neither of which is now very clear, are too inconclusive to add weight to the rule itself or throw light on its true application. It appears to have been regarded as a particular example of a wider principle, that the national character of movables cannot be changed while they are at sea by any independent dealings or occurrences. Thus, in *The Negotie en Zeevaart* (1), decided on appeal in 1782, the question was whether a ship, which went to sea a Dutch ship, had ceased to bear that national character when she was taken, because the Dutch colony of Demerara, from which she sailed, had before her capture become British by capitulation to the British Crown. It was held that she had not. This was followed in *The Danckebaar Africaan* (2), where the question was whether the capitulation of the Cape of Good Hope, which had taken place after the ship sailed but before her capture, and had made British subjects of the Dutch owners, had not also entitled them to claim their ship on arrival at the Cape as prize on the ground that there had been in fact a capture of British property. So strict was the rule even then that the claimants, though British subjects themselves at the time of capture, could not be heard to assert that title against the presumptions arising when the ship sailed. Shortly afterwards it was accepted in *The Vrow Margaretha* (3), that there was no recorded instance of a claim being sustained for goods purchased of an enemy in transit in time of war, for the practice of the Prize Court to look only to the time of shipment was already invariable.

It has been contended that this is a rule applied for the purpose of determining the status of goods, and that it is

(1) Lords of Appeal, July 18, 1782; unreported.

(2) 1 C. Rob. 107.

(3) 1 C. Rob. 336.

only so applicable ; that it decides whether goods have enemy or neutral character, but not whether they, being neutral and in themselves innocent, can be condemned as having been infected by other cargo which is contraband. No authority has been cited for this proposition.

Whether the foundation of the rule be taken to be the tendency of documentary transfers to encourage evasion and fraud, so as to defeat a belligerent's rights in one way, or the tendency of changes of ownership in transit to make the right of seizure at sea precarious, and so to defeat in another way the correlative belligerent right—namely, the right to obtain a condemnation—the reasoning is equally applicable to such cases of exercise of belligerent rights as those now in question. Its application in either case involves the proposition that the goods claimed belong in the eye of the law either to an enemy or to another neutral, and such prior owner being a person unable to claim the goods owing to their destination or their association according to the established law relating to contraband, the captor's claim to condemnation succeeds.

It was urged that if this rule originated in a question of the national character under which the ship and goods sailed, it would have no application except to cases where the national character—i.e., enemy character—was the ground upon which condemnation was or could be prayed. There is a confusion here. What can it matter whether the form of the decree is that there is a condemnation because the goods are proved to be enemy property in fact, or because the goods are deemed to be enemy property in law ? The condemnation must equally be decreed, and the determination that the goods are enemy property according to the laws of property generally, or according to the particular laws, by which in a Court of Prize the question of enemy property is to be tested, is equally an application of rules of law which bind the Court. To proceed a step further, if the determination is that the goods are enemy property, and such as would enjoy the protection of a neutral flag, were it not for the fact that being contraband they lie outside of that protection,

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

the result is the same—namely, that a forfeiture of goods, which the Court is bound to regard as being still enemy goods, follows under the circumstances of the case. The rule, stated in 1799, as being a settled rule, is still logically as much part of the process by which the liability of goods shipped by enemy merchants is to be determined as if the case had arisen before 1856, or as if the issue, enemy goods or neutral, arose directly, as it did in *The Odessa* (1), and the rule was applicable that ownership and not lien or pledge forms the test which guides the Court.

An attempt was made to use this Board's decision in *The Baltica* (2), by which their Lordships are bound, as a further ground for excluding the application to these cases of any rule which denies recognition to titles obtained through a documentary transfer made while the goods are at sea. It is true that in that case Mr. Pemberton Leigh, delivering the judgment of the Board, states that there are two possible foundations for the rule—the one that documentary transfers lend themselves to fraud and concealment, and the other that they tend to defeat the belligerent's right of seizure—and then describes the former as the "true" view. It was not, however, any part of the question then to be decided to settle the foundation of the rule, since its mere existence sufficed for the determination of the case, and in the circumstances of that case and the contemporaneous case of *The Ariel* (3) the danger of collusive transfers was the one which was most clearly to be apprehended. Their Lordships do not regard this judgment as declaring the view that these transfers tend to defeat a belligerent's rights to be a false view. Indeed, it is plain that in *The Daksa* (4) this Board was of a contrary opinion. The two views are not really inconsistent. A collusive transfer, the truth of which the Court has no means of penetrating, does defeat the belligerent's rights. On the other hand the transaction may be genuine, as in *The Baltica* (2) it was, yet not be recognized. It cannot be doubted that the reason was not that the Court was afraid

(1) [1916] 1 A. C. 145.
(2) 11 Moo. P. C. 141.
(3) (1857) 11 Moo. P. C. 119.
(4) [1917] A. C. 386.

of being deceived or felt itself incapable of ascertaining the truth, but because, if it were deceived or left in doubt, it would be unable to do justice to the belligerent captor's claim. It is, therefore, no answer to say that there was no collusion about the present transfers. They fall within a rule, which recognizes no personal or particular exceptions, and if the goods were liable to be forfeited, assuming them to be rightly stamped with enemy character when seized, an admission of a documentary transfer to a neutral would defeat the captor's rights.

As these rules are undoubtedly well established, the appellants have been principally constrained to impugn their application to the facts of the present appeals. The circumstance that they do not appear to have been applied together in the same case before is merely accidental, and if the result seems to wear an artificial appearance that is an accident also. The same may be said of the observation that in the old cases the infecting parcel has been shipped direct to the enemy by the common owner himself, and that infection in consequence of an ulterior enemy destination is new. This is merely a consequence of the development of the doctrine of continuous voyage.

Two further arguments are chiefly relied on. The first, that the rule as to infection has been virtually abrogated by the Declaration of Paris ; the second, that the rule as to transfers of goods while at sea and without delivery is inconsistent with modern mercantile practice, and therefore ought no longer to be followed. Their Lordships will, of course, pay every possible regard to such an instrument as the Declaration of Paris, but it is necessary to point out exactly what, in this connection, its provisions were. A neutral flag protects enemy goods from capture as enemy goods ; in a neutral bottom enemy goods are placed on the same footing as neutral goods. The Declaration, however, is not a charter of immunity in all circumstances for enemy goods under a neutral flag, nor does it protect goods simply as being enemy goods, which, if neutral, would have been liable to condemnation. The Declaration says nothing about

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

the criteria by which the enemy or neutral character of goods is to be determined; it says nothing about the doctrine of "infection"; it says nothing about admissibility or rules of evidence; it says nothing of the rights of a belligerent to repress traffic in contraband of war, or of the modes by which Courts of Prize give effect to and protect those rights. It is said that the grounds on which so-called "paper transfers" of property at sea are disregarded have no application in the present case, for the goods, even in the cases where they were enemy property when shipped, were covered by the neutral flag and not even potentially capable of being made good prize, and have since been transferred in good faith and in the ordinary way of trade. The answer is simple. They were capable of being made good prize, even though they were enemy goods in a neutral bottom, for if they were contraband, or were "infected" by contraband, being in a common ownership with contraband when seized, nothing in the Declaration of Paris either expressly or impliedly protected them.

It is then said that, if so, "infection" has no application, for this principle is a punitive principle and, as a neutral is entitled to trade in contraband at his peril, there is nothing for which to punish. He has not intervened in the war or sided with one party against the other, and he has carried on his own neutral trade in his own and a legitimate way. He is really being penalised in an abortive attempt to punish an enemy, who escapes the penalty. Accordingly, the maxim cessante ratione legis cessat ipsa lex applies equally as in the case of the doctrine discussed above. If the rule against recognition of transfers of goods at sea ceases to apply, because these goods cannot be good prize even if enemy-owned so that the reason of the rule is gone, equally, when the goods are proved to be neutral property, the doctrine of infection ceases to apply, for that was laid down in order to punish, and this trade is now admitted to be innocent though hazardous. Again the answer is simple.

Penalty and punishment in this connection are in a further respect unsuitable terms—namely, that they might seem to

question a neutral's right to ship or to buy contraband at his peril. Neither belligerents nor Courts of Prize exercise a general correctional jurisdiction over the high seas. The ownership of contraband goods, though often spoken of as if it were a guilty departure from the neutral duty of impartiality, is now well recognized as being in itself no transgression of the limits of a neutral's duty, but merely the exercise of a hazardous right, in the course of which he may come into conflict with the rights of the belligerent and be worsted.

The language about "innocent" and "guilty" goods, about the "offence" of carrying contraband and about taking contraband goods "in delicto" and imposing a "penalty" accordingly, was effective and apt in the connection in which it was used, but that connection involved a decision, not as to the rationale of the doctrine of infection, but only as to its application in particular cases. The decisions do not preclude their Lordships from recognizing that it is not the function of Courts of Prize to be censors of trade generally during war; that, if neutrals have the right to carry contraband, belligerents have the correlative and predominant right to prevent it; and that the doctrine of infection was established and still stands as an effectual deterrent, the need and justification for which have by no means passed away.

As to the changes in mercantile practice, it has already been indicated in *The Odessa* (1) that trade machinery, which is the growth and creation of years of peace, cannot supersede the settled law of prize. In time of war the remedy is for neutrals to change their practice and buy before shipment, and, if they pay after shipment and before they get the goods, they must take their risk of infection. In the long intervals of peace between war and war, commerce flourishes and commercial practices and modes of business change and develop while the law of prize is in abeyance, but merchants have no power to alter or affect this law, nor have Prize Courts any discretion or authority to abrogate settled and

(1) [1916] 1 A. C. 145, 160, 161.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

binding rules on the ground that their application is inconvenient to or inconsistent with the smooth and regular working of modern commerce. Nor is it the case that, when the rules now under discussion first grew up, either the use of documents as symbols of goods afloat in connection with passing the property or the practice of loading general ships with an aggregate of parcels, intended to be distributed among sundry consignees, was unfamiliar or unknown. In any case, and although Prize Courts will always be mindful of the just rights of neutrals, it is certain that none would be greater sufferers than neutral merchants, if it were once admitted that in Prize Courts fixed principles could be disregarded and settled law could be set aside in hard cases, for cases may be hard to belligerents as well as to neutrals. The President, Lord Sterndale, made some observations in his judgment in the case of the *Rena* which show how much he was impressed with the argument that a combination of these two rules, leading to the consequence of condemnation in the present cases, is harsh and impolitic, but it is plain that if mere considerations of particular hardship prevailed to alter the application of the law, the whole uniformity of the system administered by Prize Courts would be impaired. It is plain also that, if a claimant's ignorance could be relied on as an answer to the captor's rights, nothing would be easier than to defeat those rights in almost every case. Strictly speaking, a neutral is not in a position to complain of being penalised by the doctrine of infection, when his transferor and the common owner of his parcel and of the contraband parcel is an enemy, for, if the Court cannot recognize his title, he fails because he is not the owner, not because he is subject to a general doctrine of infection. It is otherwise when he takes from a neutral, but here again, if he is not owner at the time of seizure, he fails because he has no right to complain of the seizure or to defeat the rights which the captors derive from it, and if, nevertheless, he has paid his money, he loses it because, before doing so, he failed to ascertain the facts as to the goods and to make sure that the documents taken up would avail him to obtain delivery.

The result of these considerations is that, subject to the exceptional points which follow, the appellants were rightly held to be affected by the doctrines impugned and their claims were properly dismissed. It remains to consider three special cases, in two of which it is contended that the appellants became owners before the commencement of the voyage, whilst in the third reliance is placed on the terms of the Declaration of London Order in Council No. 2, dated October 29, 1914. It is convenient to take this last case first.

In the case of the *Kronprinsessan Margareta's* second voyage, two firms, Dahlen & Wahlstedt and Bergman & Bergstrand, each claim portions of her cargo. Dahlen & Wahlstedt admitted that their parcel had an ulterior enemy destination, but claimed that the Order in Council of October 29, 1914, applied to it, and, in accordance with the language of art. 35 of the Declaration of London, waived the Crown's right to ask for its condemnation. The question is whether that Order in Council, so far as it would affect this parcel, had been revoked prior to the seizure on June 15, 1916—that is to say, by the Order in Council of March 30, 1916—and this is a question of construction.

In general, when the Crown exercises such power as it has to affect the rights of neutrals by Order in Council the terms of that order, to be effectual, must be unambiguous and clear. In *The Kronprinzessin Victoria* (1) their Lordships have so held. In the present case the neutral rights affected are such as subsist by virtue of a prior Order in Council intimating an intention to waive a portion of the full belligerent rights of the Crown for the time being, but this circumstance does not affect the construction of the order under discussion. The Declaration of London Order No. 2 had announced that the Crown would observe certain articles of the Declaration of London, of which that now material was art. 35. No doubt that was a concession to neutral interests and Dahlen & Wahlstedt's transaction would fall within the terms of the article.

The Order in Council of March 30, 1916, after reciting that

(1) [1919] A. C. 261.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

doubts have arisen as to the Declaration of London Order No. 2, says in art. 1 "the provisions of the Declaration of London Order in Council No. 2, 1914, shall not be deemed to limit nor to have limited in any way the right of His Majesty to capture goods on the ground that they are conditional contraband, nor to affect or to have affected the liability of conditional contraband" to be captured under circumstances such as those of the present case; in other words that for the future His Majesty no longer assents to any limitation on his full belligerent rights in the matter in question, the terms of the Declaration of London Order No. 2 notwithstanding. In what respect are these words wanting in clearness and how do they fall short of an unambiguous withdrawal of any prior waiver of the Crown rights as affecting certain neutral shipments? They are more than a mere warning that the Crown can, by revocation of prior waivers, return to the exercise of its full belligerent rights unimpaired, nor was there any occasion for such a declaration.

Attention is first drawn to the words "shall not be deemed . . . . to have limited" those rights. As these words refer to the past and to the consequences of transactions which have already occurred, they are clearly severable from the other words of the sentence, which refer to the future. Even if they are ineffectual, for an Order in Council cannot give to a prior order any other validity or effect than that which its terms, truly construed, possessed according to law, they do not diminish the full effect of the other words as to matters within the undoubted competence of His Majesty in Council, nor do they cloud or obscure their meaning. Their Lordships think it needless and inexpedient to surmise with what object these words relating to past occurrences were inserted. The formula, now so common, which declares something to be deemed to have been what it really was not, is sometimes no doubt convenient, but the limits of its utility are soon reached and they may have been exceeded here. This their Lordships have not to consider. It is enough that the obscurity of the words in the past tense, such as it is, does not touch those in the future.

The next point is that the Order of March 30, 1916, itself in art. 2 virtually makes a reference to art. 35 of the Declaration of London as modified by art. 1 (iii.) of the Order of October 29, 1914, which is only consistent with the continuance of that article in force, and by art. 5 expressly revokes any recognition of art. 19 of the Declaration of London, thereby showing that the intention is to name articles no longer recognized and not further or otherwise to withdraw the Declaration of London Order No. 2. Their Lordships can only observe that, the question being one of clearness or ambiguity, the clearness is on the side of art. 1 of the Order of March 30, 1916, and that art. 2 is not clear enough to preserve what the words used de futuro in art. 1 have clearly renounced. The effect of art. 2 is not a point that they need further pursue. As to art. 5 there may be more ways than one of being clear, but the use of general terms in art. 1 is not ambiguous merely because the use of particular terms is adopted in art. 5, nor does the first expression fail to be clear merely because, following the model of the second, it might have been clearer.

The last contention is that the express revocation of the Declaration of London No. 2 Order in terms and in toto by the Maritime Rights Order in Council of July 7, 1916, is in itself a ground for construing the Order of March 30, 1916, wherever possible, as being something less than a revocation, and it is said that the Order of July, 1916, recognizes that some part of the Order of October, 1914, then still subsisted. In *The Kronprinzessin Victoria* (1) their Lordships observed that its whole tenor, the recitals, the repeal and the re-enactment are consistent only with the view that the Order of October 29, 1914, had up to that date remained in full force and unaffected, and such was doubtless the view which those who framed that Order in fact entertained. In the case of an Order in Council, however, the same weight does not attach to the view of the existing law adopted by its authors as attaches to the language of the Legislature when amending existing law, and in that case their Lordships had not to

(1) [1919] A. C. 261.

J. C. 1920 THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

consider the Order of March 30, 1916, at all, and decided nothing about it. Doubts had arisen and continued to arise as to the effect of these Orders in Council and it might well be thought right ex abundanti cautela to declare in July, 1916, finally and in the most general terms the revocation of an Order, which had already been cancelled, not indeed in such downright language yet with sufficient clearness.

Accordingly the claim of Dahlen & Wahlstedt fails and it is admitted that the claim of Bergman & Bergstrand is covered by the same considerations, for the shipper of the two parcels was the same person and an enemy—and no title having been acquired by Bergman & Bergstrand before the commencement of the voyage (subject to what is hereafter said upon the effect of a confirmed credit on the transaction) the enemy destination, which made Dahlen & Wahlstedt's parcel of conditional contraband liable to be condemned, would also infect the parcel claimed by Bergman & Bergstrand and warrant its condemnation also as the property in it was, at the time of seizure, in the same owner as the property in the contraband parcel.

The peculiar conditions produced by the war have led to two new features in transatlantic commerce, not necessarily connected but, as it happens, both present in these appeals. One is that all the insurances are effected in Europe by the consignees: the other that the consignor stipulates for a confirmed bank credit, against which he draws. The first appears to have been due to the difficulty of covering the war risks in America; the second doubtless arose from the fact that commerce has been carried on in new channels and not always with persons of unimpeachable personal repute, and it had the additional advantage of minimising the inconvenience to the seller of sharp fluctuations in the rates of exchange. The question now raised is whether, under circumstances which include especially these two practices, an intention can be inferred to pass the property in cargo before the voyage commences, independently alike of payment for the property or delivery of documents. If it can, the neutral buyer, becoming owner from the neutral

seller and shipper before the beginning of the transit, to which the doctrine of infection applies, escapes from the risk of it. Further, in the two cases when the sellers and shippers were the enemy firm of Diebold & Co., the transaction of purchase would be complete before the point of time at which the rule against documentary transfer of goods afloat begins to apply. These points arise in the cases of the *Parana*, the *Rena*, and the *Kronprinsessan Margareta*, on her later voyage, but, as the facts are similar in all three, the argument was presented mainly on those of the *Parana*.

In the case of the *Parana* the terms stipulated on behalf of Urban & Co., the neutral sellers and shippers, were "cost and freight Gothenburg . . . . reimbursement A/S on Malareprovinsernas Bank, Stockholm." The buyers applied to this bank to open a credit available to the sellers and to confirm to the latter the fact of their having done so, and they deposited a sum of money to make the credit effective. The bank did cable confirmation of this credit in the following terms: "Confirmed credit opened Kroners 100,000 account Lundgren Rollven against 2,000 bags coffee shipment *Parana*." The shippers thereupon took bills of lading making the coffee deliverable to the consignees' order and sent them with an invoice and a sight draft for its amount, through collecting agents of their own, to be presented together to the bank in Sweden. The appellants contend that the effect of this transaction was that the property in the coffee passed from the sellers to the consignees before the commencement of the voyage and that infection has accordingly no application to their case.

The passing of property being a question of intention is ultimately a question of fact. There is no evidence of the intention of these parties beyond the inferences to be drawn from their situation and interests and from the mercantile operations which they conducted. What law they supposed would govern their transaction is not shown nor is any evidence given of the provisions of any foreign law and, for the reasons given in *The Parchim* (1), the law to be applied

(1) [1918] A. C. 157.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

must under these circumstances be that of England so far as the matter is one of law at all. That law has attached definite presumptions as to intention to definite courses of procedure and modes of expressing and dealing with common mercantile instruments.

If the shippers had insured the goods and had attached the policy to the draft, and if they had taken the bills of lading to their own order, no question could have arisen. Again, if in pursuance of the contract the consignees had insured for the benefit, as between buyer and seller, of whom it might concern, there would have been little doubt possible. Their Lordships will assume, because the argument appeared to assume on all hands, that the insurance effected in Europe was for the consignees' benefit only, though they are by no means satisfied that it was so, and that none was effected by or for the consignor. The importance which always attaches to the incidence of insurance in international commerce makes this a significant point.

Again, importance attaches to the fact that the shippers, having loaded the coffee on a general ship—a bailment to the carrier—took the bills of lading to the consignees' order. Without the consignees' indorsement they could not thereafter demand delivery ex ship as a matter of course, though without delivery of the bills of lading to the consignees they in their turn would not obtain delivery in the ordinary way of business. The 2000 bags bought by Lundgren & Rollven appear to have been part of a total quantity of 4000 bags shipped by Urban & Co. (see *Parana* record, pp. 35, 42 and 45). These bags were lettered and numbered in different ways, probably according to the place of origin and quality of the coffee, and, unless the other 2000 bags of similar coffee were nevertheless numbered and marked in a wholly dissimilar way, of which there is no evidence, it would seem from the specification sent forward that specific bags were not appropriated to the contract of Lundgren & Rollven. Their contract was to be satisfied out of the bulk on discharge, and until some bags were then appropriated to the holders of their bills of lading, it could not be predicated of any

particular bag that it was one of those deliverable to the order of Lundgren & Rollven. In the case of the *Rena* and the *Kronprinsessan Margareta*, however, it does not appear that there was any other cargo on board shipped by the same firm and forming a bulk of which the parcels in question were only an undivided part.

There seems no doubt that business of this kind was such as the Malareprovinsernas Bank was always ready to do for a respectable customer, whose credit was good or who put it in funds for the purpose. The customer applying formally to the bank for the credit was in each case the buyer. There are some expressions in the letters of the sellers' agents in the case of the *Parana*, which suggest that they had made some arrangements on the sellers' behalf with this bank prior to the completion of the agreement of sale, so as to ensure an available credit ready to be operated upon, but no such arrangement is forthcoming or is proved, nor is there any suggestion of it in the other cases, and it does not appear that anything more passed between the bank and the consignors than a cabled statement to the effect that "as requested we inform you that Lundgren & Rollven have opened a credit with us, out of which a draft with bills of lading can be met." Their Lordships are unable to infer that, by English law at any rate, any enforceable obligation arose between the consignors and this bank. There was no contract of guarantee. The Santos cargo certainly, and the Rio cargo in all probability also, was shipped before the credit was confirmed, for in the latter case the bill of lading and the confirmation of the credit are on the same day. No letter of credit was issued; no case of estoppel has been made, and indeed the facts stated by the bank were true; no request for shipment or consignment to the appellants was made by the bank; no promise to meet the draft as an obligation de futuro arose on any consideration moving from the consignors to the bank. Their Lordships do not doubt that in the ordinary course this bank — an institution against which nothing has been said or suggested—would scrupulously apply Messrs. Lundgren & Rollven's funds in their hands

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

to meeting the consignors' draft, duly presented. Whether the bank could have resisted, if their customers had claimed to withdraw their funds before presentation of any draft, does not appear, but there is no need to suppose on either side any possibility of such a course being attempted. In the case of the *Kronprinsessan Margareta* the form of application to the bank provided for the irrevocability of the credit up to a certain time, and for this a blank was left, but it is noticeable that Messrs. Bergman & Bergstrand did not fill up the blank. It is enough to say that no obligation by the bank to meet the draft, which the drawers of it could have enforced, is shown to have arisen. Not merely was there no payment of the consignors on shipment of the goods, there was not even material for a novation. In spite of the confirmation of the credit they were and remained unpaid vendors till a much later date.

Now two things are quite plain. The consignors did not propose at any time to rely for payment on the mere personal credit of the consignees, and they carefully kept the bills of lading in their own agents' hands until the draft was met: see *Moakes* v. *Nicolson*. (1) But for the absence of a policy of insurance they strictly pursued the same course of dealing with the documents, as if there had been a c.f. and i. sale.

In these circumstances what can be inferred as to the passing of the general property? What is there to show an intention to pass that property for anything less than payment, and what motive is there for such an intention? The appellants, Messrs. Lundgren & Rollven, have to show that it passed to them and passed, too, before the beginning of the voyage. If it did, then the consignors no longer owned the goods and had nothing to show against them except a draft of their own, which could not be enforced, and a bill of lading, which would not entitle them to delivery of the goods, though its retention might seriously inconvenience the new owners, the consignees. Rights to stop in transitu or to exercise an unpaid vendors' lien need hardly be discussed, for, on a question of intention in fact as to which there is a

(1) 19 C. B. (N. S.) 290.

good deal of evidence, it would be artificial to assume that the consignors' minds were actually determined to the contrary by consideration of legal remedies, of which it is not shown that they had any knowledge, let the legal presumption be what it will. It is said that, as a matter of business, the confirmed credit relieved the consignors of all further concern in the goods, for they could have no doubt that they would be paid by the bank in any event and that the failure to insure is proof positive of this. It may be so, though their Lordships do not desire to express any opinion as to the rights of the parties if the coffee were known to be already lost at the time of the presentation of the draft, but it seems clear that the consignors desired to retain an interest in the goods, otherwise why should they retain the bills of lading in their agents' hands ? It is said that this only points to an intention to reserve a special property as security, but the omission to insure would be equally significant in this case, and there is no reason why, as a matter of actual intent, a special and not the general property should have been reserved. The case might be very different if the bills of lading had been forwarded to Lundgren & Rollven direct : *Ex parte Banner*. (1) As it is, *Shepherd* v. *Harrison* (2) would surely apply, if on presentation of the bills of lading with the draft there had been a retention of the first without payment of the second. There may be explanations of the shipper's election to be his own insurer of the coffee till the sight draft should be met, but, however this may be, there is nothing to outweigh the significance of a dealing with the documents so nearly identical with that in an ordinary transaction c.f. and i.

No authority was forthcoming which proved to be completely in point. Cases, in which it has been held that taking the bill of lading in the shipper's own name negatives any unconditional appropriation to the buyer by the delivery of the goods on shipboard and indicates one conditional on the documents being taken up, can throw only an indirect light on the question here involved. Certainly no case was found, in which it was held that taking the bill of lading

(1) 2 Ch. D. 278. (2) L. R. 5 H. L. 116.

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

in the buyer's name, while withholding delivery of it until presentation and taking up of the documents, would not be, as an appropriation, equally conditional. Much reliance was placed on *The Parchim* (1), a case not only decided on very special facts, but on facts so different from those arising in the present appeal as not in any way to rule it. That case did not in any degree substitute the incidence of the risk for the passing of the general property as the test to be applied. There the sellers of the entire cargo of a named ship took the bills of lading to their own order, but it was held that the presumption of an intention to retain the property till something was done by the buyer after shipment was rebutted by the special circumstances of the case. The contract was unusual. It was on cost and freight terms, but was by no means similar to that now under discussion. With the exception of the form of the bills of lading, which itself was determined by the sellers' agent without either particular instructions or actual knowledge of the terms of the contract, everything pointed to the intention that the property should pass to the buyer on shipment, though he was only to have possession of the cargo and of the bills of lading representing it on subsequently paying the price. Special significance was attached to the fact that, on shipment or at least on notification of it, the cargo was to be at the buyer's risk and he had to pay, lost or not lost. Meantime the documents were held by a bank in medio, neither to be transferred to the buyers without payment, nor to be placed at the sellers' disposal, unless and until the buyers failed to take them up. Incidentally it may be observed that, although the loading was only completed after the outbreak of war, the interval was short, the shipment was made in pursuance of a contract entered into before the war, and no point was taken on behalf of the captors, even if any arose, as to the passing of property afloat during war from an enemy seller to a neutral buyer by delivery of documents. The case does not purport to lay down any general rule, that a particular mode of dealing with a bill of lading must, whenever

(1) [1918] A. C. 157.

it occurs and in whatever circumstances, always prove a particular intention. It is not an authority for the contention, that, if the bill of lading is taken in the buyer's name this necessarily proves that the goods shipped are appropriated to the contract, and delivered to the captain as the buyer's bailee, with a consequent inference of the passing of the property to the buyer on shipment.

In the present case it appears to their Lordships that the retention by the seller of the bill of lading was inconsistent with an intention to pass the property. They think that it was "clearly intended by the consignor to preserve his title to the goods until he did a further act by transferring the bill of lading." The special circumstance of the existence of a confirmed banker's credit in this case is only indirectly relevant. It no doubt enhances the likelihood that the bills of lading will eventually be taken up and the goods be paid for, and so diminishes the importance to the seller of being still able to say that the goods are his, but it is not direct evidence of intention; it is only a reason why a particular intention is more likely to have been formed in such a case than in others. The intention has still to be inferred, principally from what was done and from the communications made with reference to it, and these point to an intention not to pass the property till the drafts were paid, and it is really rather a reason for intending to get the documents presented and taken up as soon as possible, than for an intention not to retain the ownership even until that could be effected. If the seller was paid or was holder of an enforcible contract from a bank for payment, the sooner he passed the property the better, for he was uninsured, but if he was neither he gained nothing by passing the property away. It was not onerous property.

In one respect the appeal succeeds. Of the two shipments by the *Parana*, the draft for the 1000 bags shipped at Santos was met by the Swedish bank a fortnight before the ship was seized. Thereupon the appellants Lundgren & Rollven became the owners, and there was not any common ownership of this parcel with an infecting parcel at the time of the seizure

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC. —

to justify the condemnation of this 1000 bags. The decree appealed against in this case will, therefore, be varied by ordering the release of this parcel, but as this success is very partial, their Lordships think that it should not affect the costs. As to the other parcel, Lundgren & Rollven fail because the goods at the date of seizure were in the same ownership—namely, that of Urban & Co., as the contraband parcel intended for Hyllen & Kock, which was condemned, and are infected, the Declaration of Paris notwithstanding. Mattsson, Peterzens & Co. fail for the same reasons. They too acquired title only after seizure and, at the time of the seizure, the goods were liable to condemnation. Bergman & Bergstrand fail because Dahlen & Wahlstedt's parcel, not being protected by the Order in Council, infected the rest of Diebold's coffee, and they cannot claim recognition of an ownership which was not acquired by payment till after seizure, and then was only effected by documentary transfer of goods afloat. The claims of Engwall, Berg & Hallgren, Levander and Ofverstrom must be dismissed, for their ownership only arises by documentary transfer of the goods while afloat, which was only effected after seizure, and the goods, when seized, belonged to the owners of a parcel of conditional contraband in the same ship, which had an ulterior enemy destination.

The appeal in the case of the *Hilding* may be dealt with shortly. It relates to 200 cases of fatbacks and 100 of clear bellies, in their nature conditional contraband, and covered by bills of lading making them deliverable to Paulsen & Co., as consignees. The 200 cases of fatbacks were the balance of a larger parcel, some of which Paulsen & Co. had appropriated to Weimann & Co., and some to Henrik Lucas as sub-purchasers under contracts previously made. That the goods had an ulterior enemy destination was not disputed before their Lordships, but they were shipped by neutrals on a neutral ship plying between neutral ports and were seized while the Declaration of London Order No. 2 of October 29, 1914, was in force. The appellants, Paulsen & Co., claimed to have bought and paid for the goods and to

have become invested with the property in them before seizure. There were on board the *Hilding* also the other cases, which E. L. Weimann & Co. and Henrik Lucas purported to have purchased from Paulsen & Co., and the claims to these were put in by Weimann & Co. and Lucas and not by Messrs. Paulsen. To these no claimant appeared at the hearing, and the President, Sir Samuel Evans, being satisfied that they had an ulterior enemy destination, condemned them. He further held that at the time of seizure the property in this parcel had not passed out of Paulsen & Co., and concluded that its condemnation in any case involved the condemnation on the ground of infection of the parcel of goods now claimed by Paulsen & Co., even assuming that they had proved the ownership to be in themselves. The President further, though his exact finding is somewhat uncertain, does not appear to have been satisfied that Paulsen & Co. ever acquired the property in any of the goods above mentioned.

It is impossible for their Lordships to review the decision of the President that the goods claimed in the name of Weimann & Co. and of their sub-purchasers were to be condemned. The statistical case made by the Crown was sufficient, unless answered, to prove the destination in Hamburg and no one appeared to answer it in support of the claim. Paulsen & Co. found it necessary to elect, whether they should say that as to this parcel they were owners no longer, or that they were owners still. They chose the former course and made no claim; they cannot now be heard to make the claim, which they would have made before the President, if they had chosen the latter.

Again, in proving their case before him they set up that they had sold to Weimann & Co. and had been paid before seizure, but before the Prize Court they never gave the date of the payment, which in the usual mercantile course, applicable to this transaction, was the crucial matter. Their Lordships could not allow them to mend their hand and endeavour to supply this deficiency on the appeal. Nor are the inferences satisfactory, which were drawn from certain

J. C. 1920 — THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

intercepted messages, referring to some customer as having "taken up" some "documents," that remained unidentified. They find it impossible, therefore, to say that the President was wrong in finding, that the ownership in the Weimann parcel had not passed from Paulsen & Co. before seizure.

Paulsen & Co. were in fact the persons to whom the goods were consigned in name and in the bill of lading. Were they, however, consignees having actual control, or were they merely intermediaries introduced as the creatures of others? The President does not expressly find either, but it is clear that he found the entire position of Paulsen & Co. to be ambiguous and unsatisfactory. On consideration of the evidence their Lordships also are not satisfied that Paulsen & Co. really controlled either the goods or their destination. The burden of proof was on them and it is only by inference that the President's judgment is suggested to find anything in their favour. It never does so in terms: it expresses doubt as to the passing of the property from Crossman & Sielcken, the shippers, at all. There is ground for thinking that not Paulsen & Co. but some other party provided the funds required and that they were only intermediaries acting as they might be directed. It cannot be said that they have discharged the burden of proof in fact, and accordingly there is no sufficient ground for arriving on appeal at a finding of fact in their favour at which the late President could not bring himself to arrive.

This makes it unnecessary to decide the point which was raised, that the naming of the consignee in the bill of lading, to which the Order in Council of October 29, 1914, refers, only avails to protect contraband goods from condemnation as contraband and cannot be extended to the further waiver by the Crown of its right to claim the condemnation on the ground of infection by goods in the same bottom and in the same ownership with goods which are contraband. Accordingly Messrs. Paulsen & Co.'s appeal fails.

Their Lordships will humbly advise His Majesty that the Order appealed from in the case of the *Parana* ought to be varied by discharging so much of the decree as condemns

the 1000 bags shipped at Santos and by directing their release or payment of their appraised value to the parties who claimed them, without costs, but that otherwise all these appeals should be dismissed with costs.

J. C. 1920 THE KRONPRINSESSAN MARGARETA, THE PARANA, ETC.

Solicitors for appellants: *Botterell & Roche; Thomas Cooper & Co.*

Solicitor for Crown: *Treasury Solicitor.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL AND OTHERS . . APPELLANTS;

AND

CORY BROTHERS AND COMPANY, LIMITED, AND OTHERS . . . } RESPONDENTS;

KENNARD AND OTHERS . . . . . APPELLANTS;

AND

CORY BROTHERS AND COMPANY, LIMITED . . . . . } RESPONDENTS.

H. L. (E.)* 1921 *Jan.* 27.

Negligence — Nuisance — Mine — Coal Mine — Colliery Spoil — Tipping on Mountain Side — Escape of Colliery Spoil — Landslide.

By an action brought by the Attorney-General on the relation of an urban district council, and by the council, the plaintiffs claimed (inter alia) an injunction against a colliery company in respect of damage done and threatened by a landslide to a road vested in the council. The colliery company had tipped a vast mass of colliery spoil on the side of a hill, where the landslide occurred, under a licence from the owners of the land on which the tips were made. The plaintiffs alleged that the landslide was caused by the action of the company in depositing their spoil on the hillside without taking reasonable precautions to secure its stability. By a second action brought by the landowners who had granted the licence to tip, the plaintiffs claimed an injunction and damages against the company in respect of damage done by the landslide to houses belonging to the plaintiffs, on the ground that the company had tipped to an unreasonable extent and in an unreasonable manner:—

Held (by Viscount Haldane, Viscount Finlay, Lord Atkinson, and

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD BUCKMASTER.

H. L. (E.)
1921
ATTORNEY-GENERAL
v.
CORY BROS. & CO.
KENNARD
v.
CORY BROS. & CO.

Lord Shaw of Dunfermline; Lord Buckmaster dissenting), on the evidence, that the landslide was due to the negligence of the company in depositing the spoil on the hillside without draining the site of the tips; and that the company were liable in the first action both on the principle of *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330, and on the ground of negligence, and in the second action on the ground of negligence.

Per VISCOUNT FINLAY: In the second action the company, in tipping under their licence, were not liable to the licensors apart from negligence, either on the principle of *Fletcher* v. *Rylands*, or on the principle of *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634, that a licence to carry on a trade does not authorize the licensee to create a nuisance unless that is the inevitable result of carrying on the trade. *Pwllbach Colliery* v. *Woodman* is limited to the construction of a licence to carry on a trade.

Observations by Lord Shaw of Dunfermline on the doctrine of joint tortfeasors.

Order of the Court of Appeal reversed and judgment of Sargant J. restored.

APPEALS from a decision of the Court of Appeal reversing a decision of Sargant J.

The first action was brought by the Attorney-General on the relation of the Rhondda Urban District Council, and by the Rhondda Urban District Council itself, the appellants, against the respondents, Cory Brothers and Kennard and others, the latter being trustees of the Crawshay Bailey estate in the Rhondda Valley, for an injunction and damages in respect of damage and threatened damage to a road and other property of the Rhondda Urban District Council by a landslide in the Rhondda Valley. The claim against the trustees in the action had, however, been abandoned, as also the claim for damages against Cory Brothers. The only claim in the action which remained to be dealt with was the claim for an injunction against Cory Brothers.

The second action was brought by the trustees of the Crawshay Bailey estate against Cory Brothers for an injunction and for damages for injuries suffered by houses and other property of the trustees by the landslide.

The statement of claim in the first action alleged that Cory Brothers deposited large quantities of colliery refuse on the side of the hill adjoining the mining village of Pentre, and that the deposit caused the landslide. An injunction was claimed,

and the only question in this action which now fell to be dealt with was whether at the date when the action was brought (October 27, 1916) the plaintiffs had a right to this injunction as against Cory Brothers.

The plaintiffs in the second action (the trustees of the Crawshay Bailey estate) were the owners of the ground on which the colliery spoil was deposited by Cory Brothers, that ground being part of the Crawshay Bailey estate. The statement of claim alleged that Cory Brothers, having permission from the trustees to tip on their land, tipped to an unreasonable extent and in an unreasonable manner and without taking reasonable and proper precautions to prevent damage, with the result that the landslide occurred, and that other property of the trustees was damaged thereby. The claim was for an injunction and damages.

In the autumn of 1916 a landslide occurred near Pentre, in the Rhondda Fawr Valley, and part of the highway from Ystrad to Treorchy, which was vested in the appellant council, was threatened and slightly damaged by a mass of earth and stones forming part of the surface soil of the lower portion of the mountain side, which slid and pressed against and partly destroyed certain houses on the east side of the highway, including the buildings known as the Woodfield Hotel and Lloyds Bank, and completely destroyed a skating rink erected farther up the side of the mountain to the east of the houses. These houses, and the land known as the Church Farm immediately above the houses, were vested in the Crawshay Bailey Trustees, and certain of the coal seams underlying the Church Farm had for some years past been worked by the respondent company under leases from the Bailey Trustees or their predecessors.

The main issue of fact was whether the landslide was due to the action of the respondent company or to natural causes. The appellant council contended that the slide was caused by the weight of two tips of colliery refuse, amounting to 500,000 tons, which had been deposited by the respondent company on the side of the mountain, some 330 yards and 400 yards respectively up from the road.

H. L. (E.)
1921
ATTORNEY-GENERAL
v.
CORY BROS. & CO.
KENNARD
v.
CORY BROS. & CO.

The respondent company contended that the landslide was a purely natural phenomenon caused by the sliding of the surface soil down the sloping side of the mountain, under the lubricating action of water on the slippery shales and fireclay of which the mountain side was partly composed.

They further contended that, if the slide was not due to natural causes, it was caused by a large bank of spoil from an old quarry made on the land of the Crawshay Bailey trustees in the years 1891 to 1904 long before the colliery tips were made.

The cases were tried together before Sargant J. In the first action he made an order declaring that the movement of part of the side of the Pentre Mountain and of the debris thereon was caused by the acts of the colliery company in placing tips and in tipping colliery refuse on the side of the mountain, and he granted a perpetual injunction against further tipping, with liberty to apply in case of apprehended danger for a mandatory injunction to compel the company to execute such works as might be necessary permanently to protect the plaintiffs' highway and other property. In the second action, that brought by the trustees of the Crawshay Bailey estate, the learned judge made an order declaring that the movement on the side of the mountain was caused by the act of the company in placing tips and tipping colliery refuse on the side of the mountain, and that they were liable to the trustees for all damage thereby caused. A perpetual injunction and an inquiry as to damages were granted, with liberty to apply for a mandatory injunction for the execution of any works necessary to protect the trustees' property.

On appeal the majority of the Court of Appeal (the late Master of the Rolls and Eve J.) were of opinion that the landslide was due to natural causes and that the judgment of Sargant J. should be reversed, and dismissed both actions with costs. Scrutton L.J. dissented as to the first action but agreed as to the second, but on different grounds.

In the first action he agreed with Sargant J. In the second action he was of opinion that the weight of the quarry spoil substantially contributed to the landslide, and that on that

hypothesis the trustees would be liable as well as the colliery company. In his view the colliery tips and the quarry spoil directly or indirectly occasioned the damage in proportions that it was impossible to distinguish. The trustees and the colliery company were joint tortfeasors who could not get contribution from each other or indemnity against each other for claims occasioned by damage threatened or done by the property of both. It followed, in his opinion, that the appeal of the colliery company against the judgment in favour of the trustees on the claim succeeded, and to that extent he agreed with the other members of the Court.

On the present appeals the plaintiffs in each of the two actions asked that the judgment of Sargant J. should be restored.

This case is not reported on the question of fact whether the landslide was due to the deposit of the colliery spoil by the company or to natural causes. The undisputed facts, so far as it is necessary to state them to explain the questions of law involved in the case, will be found set out in the judgment of Viscount Haldane. Otherwise the judgments are reported so far only as they deal with the law.

1920. Oct. 19, 21, 22, 25, 26, 28, 29; Nov. 1, 2, 4, 5, 8, 9, 11, 12, 15, 16, 18, 19, 22, 23.

Upjohn K.C. (with him *Galbraith K.C.*) for the appellants in the first appeal.

1. The colliery company, having for their own purposes placed this enormous mass of rubbish on the slope of a hill above the appellant council's road, are liable, apart from negligence, for the damage caused to the council on the principle of *Fletcher* v. *Rylands*. (1) This was a dangerous structure which they placed on the hill at their peril. *Tenant* v. *Goldwin* (2) proceeds on the same principle. As an illustration of that principle Holt C.J. instanced the case of a man making a great heap on the border of his ground and of its tumbling down and injuring his neighbour, and he concluded

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) (1704) 1 Salk. 360, 361.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

his judgment by the words "He whose dirt it is must keep it that it may not trespass."

2. The company are liable on the ground of negligence. Having regard to the immense weight of the material placed on the mountain side they should have taken steps to secure its stability and, in particular, they should have drained the ground on which it was placed. In omitting to take proper precautions they were guilty of negligence.

[He was stopped.]

Leslie Scott K.C. and *Tomlin K.C.* (with them *Hawke K.C.* and *A. F. Topham*) for the respondent company. The doctrine of *Fletcher* v. *Rylands* (1) is that where a man is making a non-natural user of his land by putting upon it some material or thing which is not put there in the ordinary user of the land, and which is likely to be a danger to his neighbour if it escapes, any one who can prove (*a*) that it has escaped and (*b*) that that escape has damaged him is entitled to recover damages without any proof of negligence on the part of the owner; but in no reported case has that doctrine been applied where the damage alleged is damage resulting, not directly from the thing that has escaped, but by some indirect operation induced by the thing escaped. The appellants' case here is, not that the colliery tips have themselves directly caused the damage complained of, but that they have set in motion the quarry spoil, which is the immediate cause of the damage. Assuming that the doctrine applies, it is incumbent on the plaintiffs to prove their case beyond all reasonable doubt, and this burden they have failed to discharge. The cause of the landslide is at most a matter of conjecture.

[VISCOUNT HALDANE said that, the majority of the House being of opinion that the judgment of Sargant J., as between the relators and the company, was right, their Lordships did not call for a reply, but that they would hear the second appeal before giving judgment in the first appeal.]

Sir John Simon K.C. and *Romer K.C.* (with them *MacSwinney*) for the appellants in the second appeal. By

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

their action the trustees made two claims against the colliery company, (1.) a claim for damages in respect of the invasion of their land by the mineral rubbish, (2.) a claim for an indemnity in respect of any liability of the trustees in the action brought by the Attorney-General. The second claim, however, has become irrelevant, as the Attorney-General's action was decided in favour of the trustees and there has been no appeal from that decision. Scrutton L.J. was wrong in treating this as a claim for contribution between joint tortfeasors. No question of contribution arises in this action, (1.) because no third party is saying that the trustees have done him any wrong; and (2.) because, even supposing that this were a claim to an indemnity from a joint tortfeasor, the doctrine of *Merryweather* v. *Nixan* (1) has no application to a case in which the claimant is not a conscious wrongdoer. The sole question is whether the trustees are debarred from their remedy for trespass. It is said by the colliery company that the trustees are the authors of their own mischief, and if they can succeed in that plea the trustees are wrong, for "Volenti non fit injuria." But the question is, Have the trustees so authorized the very thing that has been done that the damage which has ensued cannot be regarded as an injuria to them? The trustees are wholly within their rights in saying "You want a piece of ground in which you are going to tip at your discretion, not mine, and I give you that tipping ground." Unless it can be said that the very thing that has been done is the inevitable consequence of what the trustees have authorized they can recover. The real test is, Can the colliery company maintain that the claim set up by the trustees in this action is a derogation from their grant? If they could establish that the trustees would fail. *Harris* v. *James* (2), on which Scrutton L.J. relied, is not in point, because there what was done was the necessary result of what was granted. As Lord Cozens-Hardy M.R. said in *Malzy* v. *Eichholz* (3), it is quite a novel doctrine that permission to a lessee to use the demised premises for a purpose

(1) (1799) 8 T. R. 186. (2) (1876) 45 L. J. (Q. B.) 545.
(3) [1916] 2 K. B. 308, 315.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

which may or may not involve a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because the lessee in fact carries on that business in such a manner as to create a nuisance; it would be different if the letting of the land necessarily involved a nuisance. But here the licence granted by the trustees did not necessarily involve a nuisance. There is abundant evidence to justify Sargant J.'s conclusion that the company tipped improperly and could have taken proper precautions. That is a finding of negligence on the part of the company, but it is not necessary to go so far as that. The company are liable, apart from negligence, if they have tipped colliery rubbish in such a way as to cause a nuisance, unless that was the necessary result of the licence which was granted to them: *Pwllbach Colliery Co.* v. *Woodman.* (1) There the defendants were lessees of land with power to carry on the trade of miners and the plaintiff held the adjacent land under a subsequent lease from the same landowner "subject to all rights and easements belonging to any adjoining property." The plaintiff claimed an injunction to restrain the defendants from causing a nuisance by the discharge of coal dust on his premises as the result of their screening operations, and he succeeded on the ground that the grant of the right to carry on the trade of miners did not authorize the causing of a nuisance, in the absence of proof that the trade could not be carried on otherwise, notwithstanding that the screening operations were carried on in the manner which was usual in the district and without negligence. That case governs this. It is nothing to the point to say that the sum total of the forces operating when the movement occurred included the force due to the weight of the quarry spoil bank; nor is it enough to say that making tips without draining them was usual, or that the tips were there for the trustees to see.

Leslie Scott K.C. and *Tomlin K.C.* (with them *Hawke K.C.* and *Topham*) for the respondent company. (1.) Even if the slide were caused solely by the tips, yet the trustees cannot

(1) [1915] A. C. 634.

complain, because what happened was the inevitable result of what the trustees authorized the company to do. (2.) Assuming that the slide resulted from doing something which was not authorized, that was only a contributory cause, and there was another contributory cause—namely, the quarry spoil bank, for which the trustees were responsible. Therefore they were as much responsible for the result as the company. The trustees authorized the thing that was done in the way in which it was done. It is said that the colliery company ought to have drained the tips, but authority to tip is not an authority to drain and conversely is an authority to tip without draining. A right to cut the soil is a thing which must be conferred expressly, unless it is a necessary implication from the grant. Further, leave to tip means to tip in the way that is usual. The permission to tip in the circumstances necessarily involved covering the quarry spoil, and when the trustees saw what had happened they ratified the conduct of the company by taking payment and allowing them to continue as before. This ratification by the trustees is conclusive evidence that the company were doing what they were authorized to do. That consideration excludes the operation of the *Pwllbach Case*. (1) The colliery company being authorized to make tips in the way which was usual—i.e., without any drainage at all—if an unexpected damage occurs to the trustees they cannot complain in the absence of negligence. *Rylands* v. *Fletcher* (2) does not apply as between lessor and lessee or licensor and licensee in such a case as the present.

[They also referred to *Hall* v. *Lund* (3); *Lyttelton Times Co.* v. *Warners* (4); *Butterley Co.* v. *New Hucknall Colliery Co.* (5)]

Sir John Simon K.C. in reply. The maxim is not "Scienti non fit injuria" but "Volenti." Mere knowledge, assuming knowledge to be proved, is not conclusive: per Bowen L.J. in *Thomas* v. *Quartermaine*. (6)

The House took time to consider.

(1) [1915] A. C. 634.
(2) L. R. 3 H. L. 330.
(3) (1863) 1 H. & C. 676.
(4) [1907] A. C. 476.
(5) [1910] A. C. 381.
(6) (1887) 18 Q. B. D. 685, 696.

H. L. (E.) 1921 ATTORNEY-GENERAL v. CORY BROS. & Co. KENNARD v. CORY BROS. & Co.

1921. Jan. 27. VISCOUNT HALDANE. My Lords, these appeals have arisen in two actions which were tried together by Sargant J., who decided in favour of the appellants. The Court of Appeal by a majority reversed that decision. It is sufficient for the present to say that the main question was whether the respondents, Cory Brothers & Co., Ld., were responsible for bringing about a landslide which occurred in the autumn of 1916 in the Rhondda Valley, in South Wales, near the little town of Pentre, or whether anybody else, or nobody at all, could be held responsible for what happened.

My Lords, the Rhondda Valley is a populous mining valley, running down from the north-west to the south-west. At Pentre, the place of the slide, the valley is narrow, with hills on each side, and the river Rhondda flowing along its bottom. The hills at this point are about 900 feet in height from the floor of the valley to their summits, and the hillside is steep, the gradient on the upper part being about 1 in 2½. The Ystrad highroad runs beside the river from Treherbert towards Pontypridd. Pentre, towards which the slide descended, is a small mining town at the bottom of the valley, and the high-road passes through it. Close to the road, and on the side where the descent of the slide took place, were a skating rink, a billiard saloon, an hotel, and a branch of Lloyds Bank, together with other houses. Some of these buildings were destroyed and others were seriously threatened by the slide, as was the road itself and the tramway upon it. These last are vested in the appellant District Council, and the buildings first referred to are on land belonging to the appellants in the second appeal. It will be convenient to speak of these as the Landlords; of Cory Brothers & Co. as the Colliery Company or the Company, and the appellants in the first appeal as the District Council.

According to the geological formation in the valley there is, towards the top of the hill, hard Pennant rock, overlying alternating beds of grit or sandstone and shale, with narrow seams of fireclay and of coal interspersed. These strata run nearly horizontally. The rainfall in the valley is normally heavy, the annual average being from 90 to 100 inches. A

great rainfall, when it occurred, tended to make the strata of shale and fireclay slippery, so that surface soil would at times readily slide over them. The surface soil which covers the strata as they rest in situ is a top layer of soil and disintegrated strata, which varies in thickness. High up the Pentre hill it was of a thickness of 7 or 8 feet, and lower down was a good deal thicker.

The rainwater was naturally absorbed by all parts of the face of the hill. The effect of the evidence was to show that much of such water flowed down over the various hard strata, after percolating the soil, and was carried down to various drainage levels or planes of saturation, and in particular to what I shall hereafter have to allude to again as the "main drainage level," or plane of saturation, which lay well down the hill, below the quarry to the site of which reference will be made presently. But much higher up, looking from the bottom of the hill to the top, and beyond the rubbish heaps of the respondents the behaviour of which is the main topic of controversy in the case, there were, as would be expected, occasional springs, one at least of which was considerable during wet weather. The hill face appears in fine weather to have been fairly dry, but when there was much rain water accumulated and caused not only dampness but a substantial accumulation of moisture, even at points above the rubbish heaps. There were no artificial drains, and there can be little doubt that above the rubbish heaps a considerable amount of water came down from the upper part of the hill after heavy rainfall, and was either absorbed by the soil which it saturated, or escaped along the strata until it emerged at the main drainage level well down the hill. I think that it must be taken that after any heavy rainfall the water on the upper part of the hill was capable of producing a considerable lubricating effect, and of rendering soft and slippery not only the soil but the soluble fireclay and less soluble shale under it.

My Lords, it will be convenient to refer at this point to the description of the scene of the disaster and of the parties concerned. Where the slide took place there is first of all a bank which rises, from the houses facing the Ystrad Road at

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

Viscount Haldane.

the bottom of the valley, for from 16 to 40 feet. There is then a more nearly level piece of ground which extends for about 200 yards from the top of the bank up the hill. After that the hillside runs more steeply to the top of the hill, with a gradient of about 1 in 2½. In this part was a small reservoir, leased to the Pentre Brewery Company. Near this reservoir, and between it and the road, the ground was usually somewhat damp, but between the reservoir and the point at which the hill begins to rise sharply, the ground appears to have been normally fairly dry. In 1891 the landlords had granted a lease or licence to one Alban Richards to open and work a quarry on the hillside, about 400 yards from the top end of the quarry down to the road, and Richards had worked the quarry until about 1902, continuing to clear away the stone won until 1904. By that time he had excavated a substantial quarry in the form of a horseshoe. The quarry was about 50 feet deep from the top of the soil above to its floor, and about 150 feet long from front to back. It had contained, besides what had been taken out of it, some considerable blocks of good stone which had been placed on the edge of the quarry for removal but had rolled down the hill out of reach. Below the quarry there had been gradually formed a bank or tail of cast-out quarry rubbish or spoil extending down the hill. It consisted of stones and of surface material, and it extended, in a shape resembling a tongue, down the slope for a distance of about 120 or 130 yards from the quarry itself towards the road, from which its lower end or toe was distant before the slide by about 270 yards. The bed of the quarry itself occupied about an acre and a quarter.

The colliery company were a company who worked pits in the neighbourhood of the road, and who, in working their pits, had to dispose of large quantities of refuse, including bits of rock of different kinds. They had leases from the landlords, dated in 1870 and 1892, for terms which were not expired, of certain seams of coal under the land close to where the slide took place. These they worked from pits sunk on adjacent land lying to the north-west, belonging to other landowners, and known as the Llewellyn Estate. Until 1908

the company tipped all the rubbish worked out from their collieries either on to land at the bottom of the valley, or on to land forming part of the Llewellyn Estate. In 1908, the rubbish tip on that estate having become unstable, the company asked the appellant landlords to consent to their entering on the surface of their land above the seams demised in order to tip rubbish there. Under the leases referred to the company had the right to occupy for the purpose of tipping a portion of this surface shown as coloured yellow on the plan annexed to the statement of claim in this one of the present actions, paying at the rate of 60*l.* an acre for all land so used. The yellow portion lay to the south-west of the land under which were the seams demised by the trustees. But the land the company desired to enter on was land lying to the north-west of the yellow portion, and marked green on this plan. This green portion extended to the boundary of the Llewellyn Estate. Looking up the hill from the houses on the road, that estate lay to the left, the yellow land of the appellant landlords to the right, and the green portion intermediate, also theirs, straight in front. Permission was given in 1908 by the latter for tipping on the green land as requested, but on the same terms as applied to the yellow land. These terms were contained in the leases, and were simply to the effect that the company might use a defined part of the surface for working, converting, carrying away and disposing of the coal demised or otherwise for carrying into execution any of the powers given. By the second lease of 1892 it was made clear that this permission extended to the deposit of colliery rubbish. But the terms were not so expressed as to extend to the doing of anything amounting to a nuisance. The quarry, by that time wholly disused, lay contiguous to and just below the green land, and the landlords agreed with the company that the latter should tip into and fill it up.

In pursuance of the leases they had obtained the company proceeded to tip above and into the quarry. It should be mentioned that Richards, when lessee of the quarry, had thrown out of it a large amount of quarry soil, which had descended below its lower edge and formed the bank or tail containing

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO. KENNARD v. CORY BROS. & CO.

Viscount Haldane.

the irrecoverable blocks of good stone already referred to, extending down the hill, as already stated, for over 120 yards and coming to within about 270 yards of the road.

The company began to tip large quantities of rubbish on to the slope on the green land above the quarry, and soon filled the quarry itself, and raised the level of the material there. The lower part of their tip ran over the quarry proper, and extended to and covered the upper part of the quarry spoil bank. The learned judge who tried the case found that by 1914 this covering by colliery spoil so tipped had extended to 50 or 60 yards, or rather less than half the length of the quarry bank.

The tip, which the company were at this time (1912) forming, had already extended across a large part of the lower portion of the green land, and also, as I have said, right over the quarry and part of its spoil bank, which were below and outside the limits of the green land. It appears to have reached down about 50 yards below the lower edge of the quarry to about 90 yards from the toe of the quarry bank. It also extended to the ground to the right of the quarry, to a place, just below and also outside the boundary of the green land, called the "Cow's Ear." In 1912 the landlords drew the attention of the company to the fact that they had tipped beyond their boundaries. The tip so far made constituted what has been called in these proceedings No. 1 Tip, and the company at once proceeded to tip higher up the hill beyond it, and to form what has been called No. 2 Tip. In the result, No. 2 Tip, which was contiguous to the old one, began to cover part of the older tip with its lower side, and in the end the two tips became to a large extent unified. The total mass of material in the two tips amounted by 1916 to somewhere about 500,000 tons.

No. 2 Tip, as I have said, was started behind No. 1 Tip and higher up the hill. As at first formed it was a separate tip, with a small vacant space between its toe and the reverse or upper slope of No. 1 Tip; but as it grew, and as its lower face assumed its angle of repose, it came up against the reverse slope of the first tip, filled up the angle and extended over a

considerable portion, about half, of the flat top of that tip. The two thus came to form what was substantially a single rubbish heap of very large dimensions and weight. Tipping was going on at No. 2 Tip at the time these proceedings were commenced, but mainly towards the right side of the tip, and of the spot to which the slide, to which I will presently refer, took place. To the right of this spot there lay a patch of ground on to which some of the colliery rubbish had been tipped before 1912. This patch, called the "Cow's Ear," had below it, and still more to the right, a farmhouse called "Ty Fry."

I now turn to the events which culminated in the slide that has occasioned these proceedings. The slide itself was of turf and soil lying below the quarry spoil bank, of the quarry spoil itself, and of colliery rubbish, mainly from No. 1 Tip. By the end of August, 1916, this slide reached and had begun to destroy the skating rink, and to threaten other buildings at the foot of the hill and near the road. The surface soil came first, and the old quarry spoil followed and came near the buildings, and later on a quantity of the colliery rubbish descended after it. Not only was damage done, but it was plain that much more was threatened. Accordingly, just before the middle of November, the expert advisers of all the parties concerned met and devised certain remedial works. These were promptly executed, the agreement to do so being without prejudice and the ultimate burden of cost being to abide the result of the proceedings. An order was made on a motion for an injunction before Younger J. in which the terms were embodied. The remedial works, which were largely of the character of drainage works below the tips, but included also drainage above them, were successful, but, of course, from the terms on which they were made, they in no way affect the question of liability which your Lordships have to decide.

The slide took place directly on the line of and also a little to the left of the old quarry. The question to be determined is, as I have already said, whether it was due to natural causes for which no one is responsible, or whether it was caused

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

Viscount Haldane.

by the movement or pressure of the colliery rubbish tipped by the company.

My Lords, the appellants contend that on or about August 15 a movement of part of the colliery tips took place which started the slide. The company, on the other hand, say that there was no appreciable movement in these tips till nearly the end of the month, and that such movement as took place then was occasioned by tension due to a disintegration and slipping of the surface of the hill below the quarry, caused by flow of water and the outbreak of springs in that level. It is common ground that the presence of water in large quantities due to excessive rainfall brought about the slide, but the question is how it did so. If the tips were of excessive dimensions, and the weight of the 500,000 tons of mineral rubbish of which they consisted was such that when their base was saturated they were set in motion, then that is sufficient, if it is proved to have been the real origin of what happened, to fix the colliery company with liability. For if such rainfall as could make this enormous heap of stuff slide was a possible occurrence, it was negligent to put it there without taking adequate precautions to secure its stability. The liability may be based on actual negligence, as I have just suggested, or it may be established merely by showing that the hillside was steep, and that to pile rubbish on it in a large heap was to put a dangerous structure there, which was so put at the risk of the company should damage result. The line of demarcation between the proof of negligence and the proof of what is necessary to bring such a case within this well-known principle of *Rylands* v. *Fletcher* (1) is but a faint one in such circumstances as we are now considering. The rainfall proved to have occurred at the period of the slide was no doubt unusually heavy, but it was of no unique character, nor of such as ought not to have been foreseen as possible. It could not be contended that it amounted to an "Act of God," to what is called in the jurisprudence of Scotland, a damnum fatale. Indeed, were your Lordships inclined to take a different view, you would be

(1) L. R. 3 H. L. 330.

precluded from doing so by the judgment of this House in the recent case of *Greenock Corporation* v. *Caledonian Ry. Co.* (1) [His Lordship then reviewed the evidence at length and came to the conclusion that the undue weight imposed on the unreliable surface of the hill by the colliery tips was the cause of the landslide. Accordingly he felt himself compelled to dissent from the conclusions of the majority in the Court of Appeal, and to prefer those adopted by Sargant J. and Scrutton L.J.]

In the light of this result I turn briefly to the shape assumed by the proceedings in the two actions which were tried together. One was brought by the Attorney-General on the relation of the District Council for an injunction and damages against both the colliery company and the landlords, on the ground that the first of these had placed the tips and that the second had authorized them to do so. In the other action the landlords were plaintiffs, and they sued the company for an injunction and for the damages caused to the houses and land close to the road, as well as for indemnity against any liability they might be found to be under to the District Council. The claim of the District Council appears to have been throughout based on the allegation, not only of negligence, but of liability for not keeping under control an artificial structure in its character dangerous, on the well-known principle enunciated in *Rylands* v. *Fletcher*. (2) In the former action the colliery company counterclaimed against the council for having caused the slide by cutting away the toe of the hillside near the road, and in the latter action they counterclaimed against the landlords for causing the slide by cutting away the toe of the hill for buildings. Both of these counterclaims were dismissed and appeals from the dismissals have not been persisted in, and I need not refer to them further. Sargant J. decided the main issue, as I have said, against the colliery company. He held them liable to the District Council for the injunction and an inquiry as to damages, as well as for the expenses incurred under the terms of the interim order as to relief works. He also held

(1) [1917] A. C. 556.
(2) L. R. 3 H. L. 330.

(H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

Viscount Haldane.

the company liable to the landlords for an injunction and an inquiry as to damages. As to the inquiry as to damages ordered in favour of the District Council the latter do not now press for it, the effect of the relief works having been to avert actual mischief to their property. The learned judge also ordered the company to pay the costs of the landlords in the action of the District Council in which they had been joined as co-defendants with the colliery company. My Lords, if the ground for relief be actual negligence, instead of the bare principle of *Rylands* v. *Fletcher* (1), I think that this order was throughout right. For the terms on which the company obtained from the landlords permission to tip on the green land do not appear to me to have authorized the former to exercise that permission in a negligent fashion. They appear to have taken no precautions by providing for any drainage of the place where they tipped, and I think that, as between themselves and both the District Council and the landlords, they must be treated as having been guilty of actual negligence.

The result, if this be so, is that the order made by Sargant J. ought to be restored, with the single exception that the inquiry as to damages given to the District Council will be omitted. The respondents should pay the costs in this House and in the Court of Appeal. I move your Lordships accordingly.

VISCOUNT FINLAY [after describing the nature of the action and setting out the undisputed facts]. Sargant J. held that Cory Brothers, who deposited the colliery rubbish on the land, were liable for the landslide, as it had been caused by the escape of the rubbish so deposited by them, referring to the well-known case of *Fletcher* v. *Rylands*. (2) It is obviously immaterial for this purpose whether damage be caused by the colliery material itself directly or by its pushing other material in front of it downhill upon the houses and other property injured. There was every reason to apprehend at the date of the writ in the Attorney-General's action that damage might be caused by the escape of the colliery spoil in either or

(1) L. R. 3 H. L. 330. (2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

both of these ways. So far as the Attorney-General's action is concerned, it would be unnecessary to consider the question whether it was by the negligence of Cory Brothers in the deposit of the colliery refuse in too great quantities, or by their failing to take proper precautions, that the ill consequences ensued. I think that Sargant J. was right in thinking that the doctrine of *Fletcher* v. *Rylands* (1) would apply to the case and would render Cory Brothers liable for the consequences of their depositing such dangerous material, whether there was negligence on their part or not. But the action against Cory Brothers by the Crawshay Bailey trustees appears to me to turn upon somewhat different considerations.

The plaintiffs in the second action (the trustees) were themselves parties to the bringing of the colliery spoil upon their land. In consideration of payment they allowed Cory Brothers to have the use of their land for this purpose. There is no authority for applying the doctrine of *Fletcher* v. *Rylands* (1) to such a case, and, in my opinion, so to apply it would involve an unwarrantable extension of the principle of that decision. A plaintiff who is himself a consenting party to the accumulation cannot rely simply upon the escape of the accumulated material; he must further establish that the escape was due to want of reasonable care on the part of the person who made the deposit. If he does establish this he is entitled to succeed unless the licence was given in such very special terms as to prevent the licensor from complaining of negligence in carrying out the work licensed. In all ordinary cases, and certainly in the present, the licence is one only to use the land for the deposit of refuse with reasonable care. In cases which fall within the authority of *Fletcher* v. *Rylands* (1), the person who brings the material upon the land is an insurer against damage caused to others by its escape, unless this has been due to such causes as are described in English Law as the "Act of God." Such a measure of liability seems to me to be inconsistent with the relation of licensor and licensee in an action at the suit of the licensor himself. An attempt was, however, made to establish that the licensee

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

Viscount Finlay.

in such a case is under a liability indistinguishable from that of an insurer if the accumulation made by him results in the creation of a "nuisance." It was sought on behalf of the plaintiffs in the second action to apply the decision of this House in the *Pwllbach Case* (1) to the present. In that case it was held that a licence given by a landlord to carry on a particular trade on the premises demised did not extend to a case in which a nuisance was occasioned unless this was an inevitable consequence of carrying on the trade in question. The result was that a subsequent lessee of adjoining premises from the same landlord was held entitled to an injunction against the nuisance, although there had been no negligence. It was argued in support of the claim of the Crawshay Bailey trustees as against Cory Brothers that the manner in which the colliery spoil was accumulated amounted to a nuisance, and that, therefore, it must be treated as not within the scope of the licence, apart from any question of negligence or want of care in depositing tips. It was urged that the licence to bring the spoil upon the trustees' land must be read as a licence to do this only so far as it could be done without creating a nuisance, and that if a nuisance was caused, whether there was negligence or not, Cory Brothers would be liable. In the *Pwllbach Case* (1) relied upon for this purpose the plaintiff was a butcher and brought an action for an injunction to restrain the colliery company from causing a nuisance by the discharge of coal dust on to his premises as a result of their screening operations. The colliery company held a sub-lease of land under a lease by one Gough made in 1907, with power to carry on the business of miners thereon. The plaintiff's premises adjoined the land so held by the colliery company, and were acquired by him in 1909, also from Gough subject to any rights belonging to the adjoining property. The colliery company set up by way of answer to the action that the plaintiff acquired his land subject to their rights under the antecedent lease. The jury found that the colliery company caused a nuisance which affected the plaintiff's property, but that the screening was carried on in a reasonable

(1) [1915] A. C. 634.

manner and in a way ordinary in the county, and that there was no negligence. There was, however, no finding that the carrying on of the business would necessarily cause a nuisance. The Court of Appeal held, reversing Horridge J., that the lease of 1907 did not confer any right to cause a nuisance, and granted an injunction with inquiry as to damages, and this decision was affirmed in the House of Lords. The decision that a licence by a landlord to his tenant to carry on a particular trade cannot in the absence of words to that effect be construed as a licence thereby to cause a nuisance unless the nuisance was necessarily incident to such a trade is, of course, correct. I do not, however, think that the principle of this decision has any application except in the case of the construction of a licence to carry on a trade. Why should a man who gets a licence to deposit spoil, or to make a reservoir of water on the land of another, undertake to be liable to his licensor for the escape of the spoil or the water if he has exercised all due care in carrying out the licence? To make him so liable would be to impose upon him the liability of an insurer to his licensor in respect of the accumulation which he had made by the authority of the licensor. This somewhat startling result is supposed to be reached by branding the escape of the material deposited as a nuisance, and then it is said the principle of the *Pwllbach* decision applies. I do not think this is a correct view. In a great many cases adjoining landowners may enter into arrangements for the use of their properties to their mutual advantage in a way which may involve such deposit of dangerous material on the ground of the neighbour. It could not with any reason be said that in such cases there was a warranty against damage by escape of such material, while as regards all other parts of the arrangement the limitation was the ordinary one that there should be no negligence. The ordinary terms which attach to a licence to do any act are that it should be done with ordinary and proper care, and I can see no reason for importing the larger liability which exists in cases falling within *Fletcher* v. *Rylands*. (1) It therefore becomes necessary to inquire whether the trustees have

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

Viscount Finlay.

succeeded in establishing that Cory Brothers were guilty of negligence, causing the landslide. After the landslide had taken place it was agreed by all parties that remedial works should be undertaken, and these remedial works consisted chiefly in drainage to intercept the water coming down the hillside. There is a considerable body of evidence to show that drainage ought to have been provided in the first instance and that the neglect to drain, coupled with the size of the tip, was the cause of the landslide.

[His Lordship referred to the plaintiffs' evidence on this point and continued:]

The defendants, on the other hand, urged that the slide would have occurred just as much if there had been no tips at all, and that the weight of the tips and the omission to drain the ground on which they were put had nothing in fact to do with the disaster. This view they endeavoured to support by the evidence of their experts, which was directed towards establishing that it was scientifically impossible that the tips could have the effect alleged by the plaintiffs. In substance their contention is that increased lubrication from purely natural causes was the cause of the slide. Their expert witnesses and counsel discarded altogether as part of the cause the existence of the increased pressure from the tips, and urged that drainage of the sites for tips was not in practice usual, and was, in fact, unnecessary. For the reasons which I have to some extent indicated in an earlier part of this judgment I am unable to accept the defendants' contention on this point. The whole matter is most thoroughly discussed by Sargant J. in his judgment, in a passage beginning on Appendix p. 1527 at B and ending on p. 1530 F. This passage was subjected to most elaborate and searching criticism by the respondents' counsel; but, in my opinion, they entirely failed to find any flaw in its reasoning. It must be remembered that Sargant J. heard and saw all the witnesses in the course of a trial which lasted for thirty-seven days. I think that before the trial judge should be overruled on what is a pure question of fact there ought to be a much stronger case than that appearing in the judgments of the majority of the Court

of Appeal or made in argument at the Bar of Your Lordships' House.

[His Lordship then reviewed the evidence for the defence and continued :]

It was, of course, the duty of the judge at the trial to appreciate the whole evidence, that for the plaintiffs and that for the defendants taken together. He has done so in a most carefully reasoned judgment. In my opinion he was thoroughly justified in the conclusion which he expresses at p. 1530 of the Appendix. Referring to the view of the defendants' witnesses, that the sole cause of the landslide was an increase of lubrication, he says that he thought this increase was in the main an assumed or theoretical increase arrived at as a hypothesis for explaining the result, and then he goes on: "And on the other hand, as already pointed out, the balance of the scientific evidence is, in my judgment, in favour of the conclusion that the defendant company's tips did cause appreciable and, indeed, a substantial increase in weight and thrust downhill at and below the main drainage level. This being so, I think that even if a slide would have taken place at some time from natural increase of lubrication above, the proximate cause of the slide taking place when it did was rather increase in weight or thrust downhill than increase in lubrication." I am further of opinion that the evidence shows that there was want of care on the part of those engaged in the tipping operations and that this want of care caused, or materially conduced to, the disaster. This is implied in many passages in the course of the reasons for the judgment of Sargant J., and I think it is established by the evidence. The various heads of want of care in the tipping are repeatedly enumerated in the extracts from the evidence which I have made above. The most important are, in my opinion, the excessive weight of the tips and the failure to drain.

In my opinion, the judgment of the Court of Appeal should be set aside and the judgment of Sargant J. in favour of the appellants in each of the two actions restored, with the omission stated by the noble and learned Lord on the Woolsack. The appellants should have their costs here and below.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

LORD ATKINSON in concurring accepted the theory put forward on behalf of the Attorney-General, that the slide was caused by the failure of the soil lying under the quarry spoil and lower down the mountain than that spoil to support the pressure of the latter, increased, as it was to a very considerable extent, by the vast weight of the colliery spoil carried on its back, and after some further observations as to the facts he continued as follows : As between the Attorney-General and Cory & Co., I think that on the principle of *Fletcher* v. *Rylands* (1) the company would, without any negligence on their part, have been responsible for the escape of this colliery spoil from the position in which they piled it up on the land, to the use of which they were entitled. And although this spoil did not actually reach the road or the lands or pipes of the District Council, it yet did come near enough to become under the circumstances a reasonable cause of apprehended danger to the property of the Council. Because of this the Attorney-General was, I think, entitled to the order he has obtained. The case of the trustees is in many respects different from that of the Attorney-General. The purport and effect of the instruments and arrangements by and under which the Cory Company acquired the right or obtained the permission to tip colliery spoil on the lands of the trustees have been already stated. The right of tipping was given, but no provision was made as to the manner in which, or the extent to which, it should be exercised or the tips be raised. The rent which was reserved in the leases was measured acreably by the extent of the ground covered by the substance tipped. Whether the ground was covered to the depth of 1 foot or 50 feet, or 70 or 80 feet, the rent was the same. Such a licence or letting as that cannot, as between the parties to it, confer any right to commit a nuisance or erect a work dangerous to the life, health or property of those living, or having recourse to, or owning property in, the immediate neighbourhood. To commit such a nuisance, though possibly convenient, has not been shown to be necessary for the enjoyment of the

(1) L. R. 1 Ex. 265 ; L. R. 3 H. L. 330.

right or permission given. In such a case I think the tenant or licensee of land is bound to use the right or permission he has acquired with a reasonable regard to the purposes to which the land might without danger to others be put. The colliery company at the time they got permission to tip on this land were perfectly aware, or must be taken to have been perfectly aware, of all the physical conditions, the climate, the steepness of the mountain, the nature of the mountain soil, the existence of the main drainage level, etc., etc. If, without taking any adequate precautions or executing any necessary works, the company chose to pile up on this mountain side what it was under those conditions unfit safely to carry, they would, I think, be guilty of using in a manner quite unauthorized by the trustees the right or permission given to them, and would be responsible to those injured by their act. An obvious precaution which it was open to them to take, and which, as events proved, would have been effectual, was to drain the mountain side so as to prevent the lubrication which it is admitted on both sides took place under some portion of the quarry spoil. They did not do that. They did not do anything to prevent danger and injury resulting from piling up the enormous mass of 500,000 tons of quarry spoil on this steep mountain side. The negligence of Cory & Co. in this respect makes them responsible as between them and the trustees for the escape of the colliery spoil, despite the licence enjoyed by them, on the authority of the case of *Rylands* v. *Fletcher*. (1) They had permission to bring the spoil on the lands of the trustees. By reason of that permission the company would not be liable to the trustees if the spoil escaped without any negligence on their part, as they would be liable if the trustees had been strangers with whom they had no contractual relations. No right or permission was expressly or impliedly given to them to exercise the right or permission they had obtained without reasonable care. It, as I have said, was not necessary for the enjoyment of that right or permission that they should exercise it in the extremely dangerous and unreasonable

(1) L. R. 3 H. L. 330.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & CO.

KENNARD v. CORY BROS. & CO.

way in which they have in fact exercised it, and in my view the trustees are entitled to the relief against the company which they claim.

I approve of the order proposed to be made.

LORD SHAW OF DUNFERMLINE (read by LORD ATKINSON). My Lords, a protracted consideration of this case has convinced me that the judgment upon it which was pronounced by Sargant J. is in all points correct. I have reperused it after a fresh survey of all the salient points in the evidence and papers to which the attention of the House was directed. I do not entertain any doubt either of the accuracy of the analysis made by the learned judge of the evidence before him or of the soundness of his conclusions thereon. I desire further to say that I feel relieved from the task of making a separate statement of the case in the House, because of what has been put before your Lordships in the address of my noble and learned friend Lord Finlay, with whose judgment I also respectfully concur. There is, however, one point of view which, although involving no difference whatsoever from the opinions of these learned judges, induces me to go one step further as to the liability of Messrs. Cory for the accumulation of this colliery refuse on this wet hillside. I am of opinion that the accumulation was not brought down by a convulsion of nature. Further, I think that no study or at least no proper and sufficient study was made of the circumstances, geological, climatic and otherwise, in the midst of which this accumulation was to be placed, and that neither adequate forecast nor provision was made in respect to the avoidance of danger, but that on the contrary the accumulation was made recklessly and negligently. Liability of a positive character, that is to say further than the liability which the doctrine of *Fletcher* v. *Rylands* (1) would impose, has been incurred.

On the facts of the case I venture to use the following sentences from the opinion of Sargant J., as expressing with complete accuracy my own opinion thereupon: "I am

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

convinced," says the learned judge, "that the slide in question was caused by the failure of the ground under the quarry bank or quarry tip, and lower down the hill than that tip, to support the pressure of the quarry bank or tip as increased by the added pressure of the colliery tips. This added pressure was in the main, in my judgment, due to the increase in tip No. 1 as it gradually extended over the quarry bank and (to a lesser degree) to the increase in tip No. 2 as that in turn covered a large part of the surface of tip No. 1, and pressed on and against that tip. Any one of a number of small causes may have effected the slight extra differences necessary to change a state of unstable equilibrium into motion. It may have been the actual fall of rubbish from tip No. 2 on to tip No. 1. It may have been an unusual amount of rain adding slightly to the weight of the tips or causing a slight extra lubrication of the ground vertically below and downhill of the quarry bank. It may have been a trifling jog due to a very slight subsidence in consequence of the workings in the Bute seam. Whatever the nature of this final incident, I am convinced that the slide could not have taken place had there not been these tippings by the defendant company in the extraordinarily dangerous position in which, even according to their main theory, their tips were placed."

My Lords, I attach great weight in this case to the fact that the accumulation upon this steep hillside of a mass of colliery refuse, estimated to weigh 500,000 tons, was made without any attempt or effort to drain away the water descending from further up the hill. I have no doubt in my own mind that means should have been taken effectively to drain the actual site of these tips. There is a large body of evidence holding this to have been necessary. I think such drainage was vital.

But it was not until the remedial works and the necessary investigations in connection therewith were started that it was known how enormous were the quantities of water which, thus entering from the upper side of the tips and percolating beneath them, steadily did the work of reducing shale and clay into a viscous material and assisted the sliding of the

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

Lord Shaw of Dunfermline.

mass downhill of this superincumbent material. Part of the remedial works was, of course, to trap at least a considerable quantity of this water and to divert it away from the colliery spoil heaps. Had that not been done I have the greatest doubt whether the further descent of the colliery spoil and that in most damaging volume could have been avoided. This consideration it will be observed is altogether apart from the question of the volume of material accumulated upon the hillside above the quarry. But the greater the accumulation I think also the greater was the need for the drainage of the tip site.

In regard to that accumulation I will only mention two facts which appear to me of the utmost gravity. Messrs. Cory Brothers obtained a licence from the Bailey trustees to fill up the excavated quarry. This excavated site was backed by the perpendicular wall of the quarry, and its floor was 50 yards forward to the edge of the cliff and 120 yards wide. It may quite well be that had Messrs. Cory Brothers confined themselves to filling up the quarry to its excavated dimensions no harm would have resulted. But what they did was not only to fill up the quarry, but to cover it over with enormous masses of spoil which reached high above the natural quarry level or the natural slope of the hill, overflowed the same down past the edge of the quarry, and superimposed itself for about 50 or 60 yards upon the quarry spoil which had lain on that part of the hill for 14 years. Upon a protest by the trustees they then started another colliery tip farther up the hill called tip No. 2, again without any precaution for the drainage of its site or the diversion of inflowing water therefrom. Then came the increase of tip No. 2 till it reached and overflowed part of No. 1, and all became consolidated as your Lordships have described.

My Lords, it is for these reasons, which I have briefly sketched, that I am of opinion that the respondents' conduct was negligent. In saying so I have considered the evidence of both sides, including the somewhat involved testimony of Dr. Simoens. If the theory of this learned man be sound,

it is extremely difficult to see why what happened could ever have happened, and in saying so I wish to observe that I think it is impossible to discard or to treat as false the evidence which your Lordships have already analysed of the rolling down of material and of the sagging of the line of the colliery tips in the month of August. These things have been quite clearly spoken to, and I see no reason to doubt the account given.

I am inclined to the opinion that the theory to which I have referred was, so far as the conduct of this case is concerned, an afterthought, and that it is for that reason that the witnesses for the respondents had not the theory of the defence placed before them clearly and fully, and were not confronted with the alleged physical impossibilities which have been pleaded before your Lordships. It is extremely desirable in all such cases that, so to speak, the rival causes for an occurrence should be frankly divulged and that highly skilled men should not be in the position of having their evidence overborne by a theory which was not placed before them, which they might on pressure and explanation have accepted or completely disposed of. A late appearance of a theory in a case affecting natural phenomena weakens the evidence in support of it, however sincerely those proffering it may present it. In the present case, however, I am of opinion that the great weight of evidence is in favour of the view adopted by Sargant J.

The reasons thus given apply also to the case of the Bailey trustees. Had these trustees granted a licence to use their ground for colliery tipping, irrespective of height or dimensions, or in any manner, however neglectful of ordinary precautions, they would of course have been debarred from claiming damages consequent upon such operations. In my opinion, however, there was no specific grant which absolved the appellants from the duty of taking all reasonable precautions. These they did not take, and in consequence of this failure of duty upon their part damage ensued. The owners do not appear to me to have lost their remedy by reason of the licence given. The damage has been incurred by reason of the licensees'

H. L. (E.)
1921
ATTORNEY-GENERAL
v.
CORY BROS. & CO.
KENNARD
v.
CORY BROS. & CO.
Lord Shaw of Dunfermline.

conduct having been an improper excess or abuse instead of a proper use of their powers as licensees. With much respect to Scrutton L.J., with whose analysis of the facts of the earlier portion of the case I so much agree, I cannot see my way in regard to this claim by the trustees to introduce the doctrine of joint tortfeasors into the consideration and determination of this liability. That doctrine is known and applied in a question with a third party, but as between the Bailey trustees and Messrs. Cory Brothers there is no third party. The true question is whether the Bailey trustees are prevented from recovering for damages done by Messrs. Cory to their property, because they are themselves in such contract relations to Messrs. Cory as to debar them from making a claim. If they have granted the right to cause damage, then to claim damages would be to derogate from their own grant. Or in another aspect, they cannot claim for an injury which the contract relations show expressly or by implication to have been an injury which they were willing to suffer. These principles, either (1.) derogation from grant, or (2.) "Volenti non fit injuria," are those which might have barred or excluded the claims (principles which are in no way the same as the principle of joint tortfeasors); but both the principles referred to are however excluded when it is seen as in the present case that the contract made or licence given did not necessarily involve the neglect of ordinary and proper precautions in the use of the powers given, but, on the contrary, involved that such precautions should be taken.

I concur.

LORD BUCKMASTER. My Lords, I have the misfortune to differ from the other noble and learned Lords who have heard this case, from the judgment of Sargant J., and, though in a less degree, from Scrutton L.J. It is true that I have not received the full advantage of hearing counsel for the appellants in reply, for, upon his being informed that the majority of the House were in his favour, he exercised a merciful discretion in not further elaborating an argument which, though it might have produced

unanimity, could not have changed the result and would have thrown upon the unsuccessful litigant even a heavier burden of costs than that which he is now called upon to pay. In the second appeal, however, I enjoyed the opportunity of listening to the views advanced by Sir John Simon, and I think it may be doubted if there is anything further to be said upon the matter.

Although the two actions have been dealt with together throughout the whole course of the proceedings, they need separate consideration, and I will deal first with the claim of the Urban District Council.

No part of their property was ever in fact injured by any of the matter that came down from the defendants' pits. So far, therefore, as their claim was for damage actually sustained, it could only be supported by proof that the colliery spoil, though not itself the actual agent of destruction, was the real cause of the movement to which that destruction was due.

At one time I thought that the same considerations would not necessarily apply to an injunction, for the near approach of the heavy matter that formed part of the colliery tip, and the difficulty of knowing whether the causes that had originally set the hillside in motion were still at work, might have afforded reasonable ground for apprehension as to prospective danger sufficient to support the claim. The distance, however, of any part of the colliery spoil from the plaintiffs' property when the slide ended, which is at least 100 yards, the fact that the intervening ground is flat, and the extreme probability, if not the actual certainty, that if further damage occurred it would be due to the independent action of the hillside soil, and not to the colliery refuse, renders, in my judgment, a claim for an injunction to stand on the same footing as the claim for damages, and to be incapable of justification unless the colliery spoil was the original cause of the disaster. From this it follows that the burden of proof that such was the case rested upon the plaintiffs' counsel, and I find myself unable to accept the view that this has been discharged.

H. L. (E.)
1921
ATTORNEY-GENERAL v. CORY BROS. & Co.
KENNARD v. CORY BROS. & Co.
Lord Buckmaster.

The nature of such a burden must vary with the varying conditions of each dispute, nor in the present case is it incumbent on the plaintiffs to establish with certainty the true origin of the slide. Hidden and indeterminate forces such as those which have destroyed the equilibrium of this hill evade inquiry, and in such a case decision can only be reached on a balance of probability and hypothesis, but the plaintiffs must, none the less, show that the balance inclines in their favour, and it is this that in my judgment they have failed to do. [His Lordship then reviewed the evidence and quoted the following passage from Scrutton L.J.'s judgment:] "I am satisfied that up to this time" (August 31) "what had happened had been that the soil under the quarry tip, both beneath it and below it, had slipped through rainfall, and had started downhill the quarry spoil and the surface soil; and that these once started had pressed on and assisted the soil below also to slide. I think that up to this time the soil under the colliery tip may have moved slightly, causing, together with the withdrawal of quarry spoil below, movements in the colliery tip; but that the movement of the colliery tip, not nearly so extensive as that of the quarry tip, was due to the support beneath it moving from causes only very slightly affected by the weight of the colliery tip. In other words, the slide so far was due to water loosening the grip or hold of the surface soil and not primarily to the weight of the colliery spoil pushing down the matter below it; though, in my view, once the lower soil slipped, it was the weight of the colliery tip that caused it to follow, and the weight of the colliery tip once started had some dynamic effect on the soil and debris below it, though not much." [His Lordship then continued as follows:] His view, however, is that when once movement began the colliery spoil acted as a propellant and urged the other masses on. I do not think this is consistent with the facts to which I have referred, nor does Sir Maurice Fitzmaurice's statement that when "once this movement happens you cannot say on any theory what happens afterwards" help the plaintiffs, for if the movement began,

as I think it did, with the quarry spoil, this statement means that afterwards no one can assign responsibility to any element in the ensuing ruin.

Further, I think the evidence shows that ultimately the soil below, which was the real cause of the damage, was not in a state of pressure but in a state of tension. The cracks that are spoken of at its surface, extending over the ground up to the quarry spoil, and the bending of the piling which supported some of the buildings, are all evidence of such tension unless they are capable of being explained, as was suggested, by the cracks representing the breaking of the crest of the wave in which the soil was pushed down the hill, but this I am unable to accept. Once started, as it was, either by independent sliding or by the initial movement of the quarry spoil, it was no longer pushed on its course. Scrutton L.J. appears to agree with this view so far as the original movement is concerned, for he says: "Mr. Justice Sargant, in his very careful judgment, arrived at after a patient hearing of this extremely lengthy case, which I am afraid I should not have been able to imitate, expresses the opinion that the theory of lubrication is not sufficient to explain the parting of the slide as compared with the theory of weight. I doubt whether he has attached sufficient importance to the comparative history of the rainfall and the slide which have led me to the conclusion that rain mixed with clay overcoming friction really started the soil on and uphill of which the quarry spoil rested. The same cause may have started the colliery spoil, or it may have been the removal of support given by the quarry spoil, or it may be both." But he concludes by saying: "In my view the cardinal fact remains that an artificial mass dangerous unless retained in its first position had not been kept there, but had travelled a long way downhill and was likely to continue its movement." This conclusion following on the careful analysis given by the learned judge of the doctrine of *Fletcher* v. *Rylands* (1) leaves me to think that he must have regarded the colliery spoil as the actual cause

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

Lord Buckmaster.

of the damage, but this it certainly was not, nor, according to the learned judge, did it begin the movement, nor, as I have attempted to show, could it have caused its acceleration, and it was therefore not responsible for the result.

This really disposes of the case that was placed before the House by counsel for the Urban District. [His Lordship then referred to Sir John Simon's argument on the facts and concluded as follows :] I do not venture to speak with confidence about the interesting theories propounded by Mr. Simoens, the eminent Belgian geologist, but they appear to me to be carefully thought out, based upon reasoning which it is difficult to answer, and to afford the only explanation of the undoubted fracture of the quarry floor and the descent downhill of the vast masses of rock which formed its structure. Had the colliery spoil, in fact, invaded the plaintiff's property the result would have been different. It would then have been sufficient for the plaintiffs to show that matter had been artificially piled by the defendants upon the hillside and that that matter had descended and caused damage to the plaintiff's property, and it would have been incumbent on the defendants to establish, if they could, the very limited defences that would have been open to them. I agree entirely with Scrutton L.J.'s exposition of the law on this point, but in the circumstances the legal question does not, in my opinion, arise. This view disposes not only of the claim of the plaintiffs, the Urban District Council, but also of the trustees, because upon this view it was the spoil deposited by their licensees that was the initial cause of the whole trouble, and that would in itself be sufficient to prevent their recovering. I do not, therefore, examine more closely the facts of the licence to tip which they gave to the defendants, but I am far from being satisfied that in the circumstances permission given to continue their tipping and to fill the quarry would not in itself have afforded a defence if it be assumed that it was from the matter so deposited that the accident arose.

In my opinion, therefore, both appeals fail and should be dismissed with costs.

ATTORNEY-GENERAL (AT THE RELATION OF RHONDDA URBAN DISTRICT COUNCIL) AND OTHERS *v.* CORY BROTHERS AND COMPANY, LIMITED, AND OTHERS.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

Order of the Court of Appeal, so far as complained of, reversed, and order of Sargant J. varied by omitting the words "damages have been sustained by the plaintiffs by reason of the said acts of the defendant company such damages to include" and substituting the words "is the amount of," and, subject to such variation, restored. The respondents, Cory Brothers and Company, Limited, to pay to the appellants and also to the respondents therein named [being the Crawshay Bailey trustees] the costs incurred by them respectively and by the late J. M. Curre in the Court of Appeal, and also the costs incurred by the appellants and the said respondents in respect of the appeal to this House. Cause remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, Jan. 27, 1921.

KENNARD AND OTHERS *v.* CORY BROTHERS AND COMPANY, LIMITED.

Order of the Court of Appeal, so far as complained of, reversed, and order of Sargant J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House, including the costs of the petition presented to this House by the respondents on May 13 last. Cause remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, Jan. 27, 1921.

H. L. (E.) 1921

ATTORNEY-GENERAL v. CORY BROS. & Co.

KENNARD v. CORY BROS. & Co.

Solicitors for the appellants, the Rhondda Urban District Council: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for the appellants, Kennard and others: *Rider, Heaton, Meredith & Mills.*

Solicitors for the respondents, Cory Brothers & Co., Ld.: *Ingledew, Davies, Sanders & Brown, for Ingledew & Sons, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *March* 3.

OWNERS OF S.S. MENDIP RANGE . . APPELLANTS;

AND

RADCLIFFE . . . . . RESPONDENT.

Shipping—Admiralty—Collision—"Not under command"—Crossing Courses—Regulations for Preventing Collisions at Sea, 1897, *arts.* 4, 19, 21—*Concurrent Findings.*

In an action arising out of a collision between a merchant ship and one of His Majesty's cruisers, which was disabled and had exhibited the "not under command" signal, the owners of the merchant ship claimed damages against the officer in charge of the cruiser for negligent navigation.

Roche J. and the Court of Appeal were of opinion on the evidence that the cruiser was out of command and that the defendant was not guilty of negligence in the navigation of his ship in her disabled condition, but the Court of Appeal differed to some extent from Roche J. on one subsidiary question of fact:—

Held, by Viscount Haldane, Viscount Finlay, and Lord Atkinson, that there having been concurrent findings of fact substantially on the same grounds by the Courts below, their decisions ought not to be disturbed; Lord Wrenbury and Lord Phillimore, dissenting, being of opinion that there had not been concurrent findings of fact.

Observations of Lord Atkinson as to the meaning of concurrent findings.

Where vessels are on crossing courses and the "give way" vessel is not under command and has exhibited the "not under command" signal, she is relieved from the obligation of keeping out of the way of the "stand on" vessel, the only duty of the officer-in-charge being the common law duty of care in navigating the vessel in the condition in which she is;

---

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD ATKINSON, LORD WRENBURY, and LORD PHILLIMORE.

and the "stand on" vessel owes a duty to the "not under command" vessel, as a matter of seamanship, to keep out of the way.

Per Viscount Finlay: A vessel must be considered as "not under command" for the purpose of art. 4 of the Regulations for Preventing Collisions at Sea if she is in such a condition owing to an accident that she can only get out of the way of another after great and unusual delay.

Dictum of Lord Herschell in *The P. Caland* [1893] A. C. 207, 212 approved.

Per Viscount Finlay and Lord Phillimore (Lord Atkinson inclining to the contrary opinion): The question whether the hoisting of the "not under command" signal is justified under art. 4 depends upon the condition of the vessel in point of fact, and not upon the belief of the officer-in-charge as to her condition, although that belief be formed honestly and on reasonable grounds.

Dictum of Bowen L.J. in *The Beryl* (1884) 9 P. D. 137, 144, and dictum of Lord Herschell in *The Ceto* (1889) 14 App. Cas. 670, 693–4 discussed.

Decision of the Court of Appeal [1919] P. 362 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a decree of Roche J.

The action arose out of a collision between the steamship *Mendip Range* and H.M.S. *Drake*, which took place in Rathlin Sound off the coast of Ireland at about 10.25 A.M. on October 2, 1917. By the action the appellants, as owners of the *Mendip Range*, claimed damages against the respondent as officer in charge of H.M.S. *Drake* by reason of the negligent navigation of the *Drake*. The ships were on crossing courses, the *Drake* being the "give way" ship and the *Mendip Range* the "stand on" ship. The *Drake* had been torpedoed and was badly disabled, and on approaching the *Mendip Range* she exhibited the two black balls which are required to be shown under art. 4 of the Regulations for Preventing Collisions at Sea to indicate that the vessel is not under command and cannot therefore keep out of the way.

The facts are fully stated in the report of the case before the Court of Appeal, and they appear sufficiently from the judgment of Viscount Haldane.

Roche J. was of opinion (1.) that the *Drake* was justified in exhibiting the not under command signal, (2.) that the officer in charge was not guilty of negligence in the navigation of the ship under the circumstances, and (3.) that the *Mendip*

(1) [1919] P. 362.

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Range was not guilty of negligence, and he held that neither ship was to blame for the collision.

The Court of Appeal (Bankes L.J., Scrutton L.J. and Eve J.), in affirming the decision of Roche J., concurred in these conclusions, but they differed to some extent from the finding of Roche J. as to the precise course taken by the *Drake* immediately before the collision.

1921. Jan. 18, 20, 21, 24. *Laing K.C.* (with him *Lewis Noad*) for the appellants. Where two ships are on crossing courses and the not under command signal is hoisted by the give way ship, the obligations of the respective ships are reversed. Either as a matter of inference from the Regulations or under the rules of good seamanship the broken down ship should keep her course: *The Hawthornbank.* (1) At any rate she must not make any active movement to bring herself across the course of the other ship. Here the *Drake* ought to have refrained from porting. The appellants rely on Roche J.'s finding that there was a sudden porting at the last. It was impossible for the *Drake* to have been using 20 degrees of port helm for 10 minutes under a speed of 8 knots without it being visible to the *Mendip Range.* Even if the *Drake* was justified in exhibiting the not under command signal she must act in a reasonable and seamanlike manner: *The P. Caland.* (2) But applying the tests put by Lord Herschell in that case in considering whether a vessel was not under command, the *Drake* was not a vessel which was "not under command" within the meaning of art. 4. She could steer a steady course, she could answer her helm, and there was no emergency. In these circumstances when she exhibited the black balls she broke the rule. But, whether she was within the rule or not, she was governed by the rules of good seamanship, and the navigating officer ought to have known that when he had exhibited the out of control signal it was the duty of the *Mendip Range* to get out of the way, and that it was bad navigation on his part to port. Roche J. and the

(1) [1904] P. 120. (2) [1893] A. C. 207, 212.

Court of Appeal are not in agreement on the questions of fact. This, therefore, is not a case of concurrent findings of fact.

Butler Aspinall K.C. and *Dunlop K.C.* for the respondent. (1.) The *Drake* was not under command. (2.) Being not under command the collision was not caused by any negligence on the part of her officers. As to (1.), the *Drake* was not under command in fact. But even if she was, nevertheless, having regard to the condition of the ship so far as it was known to the respondent, he was justified in exhibiting the not under command signal. Three out of the four assessors agree with the finding of Roche J. that she was out of command. Then as to the defects as known to the respondent. Her speed was reduced ; she could not use her whistle (see arts. 27, 28 and 29) ; her steering power was defective and there were difficulties in getting any order carried out quickly ; she was substantially down at the head ; and there was a large hole in her starboard side. Art. 4 is to be read in conjunction with arts. 27 and 29. Art. 27 shows that if an officer honestly believes on reasonable grounds that he cannot rely on his ship he is right to put up the out of command signal. That article makes it clear that the officer must act as an ordinary prudent seaman should. Bankes L.J. was right in saying that the question whether a vessel is or is not under command is largely a question of seamanship. As to (2.) : In fact the *Drake* was aport before and when the out of command signal was exhibited, and if so, the respondent was not negligent in keeping her helm aport. The right thing for him to do in the circumstances was to adhere to a continuity of action. Further, this is a question of fact, and on this there have been concurrent findings by the Courts below.

Laing K.C. in reply. (1.) On the language of art. 4 a vessel, in order to justify putting up the out of control signal, must be in fact not under control. This vessel was under control until she went over. She was under control for two hours before and for a considerable time after the collision. (2.) When the *Drake* said that she could not get out of the way in the usual manner, the captain of the *Mendip Range* would naturally assume that she would not port and was

H. L. (E.) 1921 S.S. MENDIP RANGE v. RADCLIFFE.

misled by her porting. (3.) The rule as to concurrent findings does not apply, first, because the two Courts do not agree as to the facts, and, secondly, because the applicability of art. 4 is a question of mixed law and fact.

The House took time for consideration.

1921. March 3. VISCOUNT HALDANE. My Lords, the evidence in this case shows that the *Drake*, the cruiser commanded by the respondent, came round the northern side of Rathlin Island, and was compelled, as the result of the damage done by the torpedo which struck her, to abandon her original intention to try to proceed on a south-east course to Belfast. It was finally determined to take her round the Island at its southern point, and to bring her to anchor in shoal water in Church Bay, on the west side of the Island. This the cruiser endeavoured to do, first turning round, east or south-east of the Island, under starboard helm, so as to get into position, and thereafter being navigated under port helm. Her condition was bad. Two of her boiler rooms were out of action and full of water, and her speed had been reduced by a half. The steam steering gear had been carried away, as had been also the telephonic communication to the hand steering gear, which was in the afterpart of the ship, below the water line. The steering orders from the bridge had consequently to be given by transmission through a row of men, probably about twelve, and the management of the helm was, therefore, slow and ineffective. She had also a list to starboard, and was not under anything approaching to normal effective control, but had a tendency to yaw. The captain seems to have decided that he must somehow get her round the southern point of the Island, which is known as Rue Point. Her syren or whistle had been rendered useless by the explosion. She was kept under port helm as soon as she was got into position, and she continued to be so kept, the helm being about 20 degrees to port. She was thus approaching Rue Point slowly, at a speed of about seven knots. As she was so approaching the Point she exhibited two black shapes, to indicate that she was not under control

or command, and these were seen by those on board the *Mendip Range*, which was approaching to near Rue Point from the other side of the Island. At this time the *Mendip Range* was about three miles distant from the *Drake*. This was on October 2, 1917. In the end a collision took place between the two ships somewhere between 10.25 and 11 in the forenoon of that day.

My Lords, the *Mendip Range* was directing her course so as to pass between Rue Point and the Mainland of Ireland, which was about two miles off. The scene of the collision was somewhere midway between the Island and the Mainland, possibly nearer to the former. The *Mendip Range*, which had been among a group of vessels which the *Drake* had convoyed until they were near Rathlin Island, was proceeding eastwards at a speed of about ten knots. It was prudent for her to go at this speed because there was reason to suppose that more German submarines might be in the vicinity. The courses of the *Drake* and the *Mendip Range* were in the first instance respectively roughly south-west and south-east. The collision took place at about right angles, the ram of the *Drake* striking the starboard side of the other vessel. By this time the *Drake* was veering in her direction to a little north of north-west, and the *Mendip Range* to about north-east.

My Lords, the action was brought by the appellants as owners of the *Mendip Range*, against the respondent as officer in charge of H.M.S. *Drake*, for damages caused by his negligent navigation. The defence was no negligence on his part, but negligence on the part of those on board the *Mendip Range*. The trial judge (Roche J.) held that there was no negligence in the navigation of either ship, so that neither was to blame. The Court of Appeal took the same view. There was no counterclaim, for an obvious reason. The captain of the *Drake*, who could only be sued personally, had suffered no damage individually. There could, therefore, be no cross-appeal as to the finding of Roche J. that the *Mendip Range* was not to blame. Having regard to the form of the proceedings and of the judgment, I do not think that this causes any

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Viscount Haldane.

difficulty. The only point which the respondent has to establish is that he was not to blame, and he is not estopped, in my opinion, from raising any argument which is relevant to this point, even though it may involve some reproach to those on board the other ship,. However no such question, in the view which I take, arises.

My Lords, it must be assumed that those on board the *Mendip Range*, having seen the special signal, knew that the *Drake* was not under control or command, and that an obligation, therefore, rested on themselves to keep out of her way. I think that if the special signal was justified by the condition of the *Drake*, it exempted her captain from the duty of carrying out the provisions of the collision regulations as to ships on crossing courses. That the facts warranted the giving of the signal I entertain no doubt. The state of the steering gear and of the shattered cruiser generally was such that the captain was justified in thinking that he could at least do little more than get round the Point before she was in danger of foundering. His control over her course had ceased to be effective. I think that, as a consequence, his duty was no more than the common law duty of care in navigating his ship in the condition in which she was.

The case made against the *Drake* was that the master of the *Mendip Range* observed her to be so heading that it was not safe to attempt to pass across her bows, and that in order to pass astern of her he starboarded his helm. It is said that after he had so starboarded for an appreciable time, two or three minutes, the *Drake* suddenly ported her helm, with the result that she rammed the other ship.

My Lords, both of the Courts below have found the facts differently from this. The view they took was that the *Drake* had been, since the time when she was first sighted, continuously under a port helm without alteration, and was keeping her course. She could steer only imperfectly, and she was not in a position to alter her helm rapidly. Her object was, by keeping a port helm, to manage to get round the Point to the bay, taking care, as she could not deflect her course, excepting very slowly, and might yaw, not to

approach too closely to the land. Her case is, in short, that such as her course was, it was one already adopted when she was first sighted by the *Mendip Range*, and that from this course she never deviated. Roche J. found that she did not, after the *Mendip Range* had committed herself in the final minutes to a starboard helm, herself turn her helm to port. If her direction altered at all at the last moment, and this is not clear, it was not as the result of a change of helm, but would, if it happened, be due to uncontrollable yawing.

My Lords, this is a concurrent finding, and even if I felt myself free to dissent from it, there is nothing in the evidence which inclines me to do so. I think further that the fact so found is a cardinal one, which disposes of the real foundation of the argument of the appellants. Those on board the *Mendip Range* may have been justified in taking the steps they did just before the collision, although they did not succeed in averting the collision. But those on board the *Drake* were not shown to have been in any way to blame.

I am, therefore, of opinion that the appeal fails.

VISCOUNT FINLAY. My Lords, in this case a collision took place on October 2, 1917, in Rathlin Sound, between the steamship *Mendip Range* and H.M.S. *Drake*. An action was brought by the owners of the *Mendip Range* to recover damages on the allegation that the collision was caused by the negligence of those in charge of the *Drake*, the commanding officer being the nominal defendant. The defendant denied negligence on the part of the *Drake* and pleaded that the collision was caused solely by the negligence of those on board the *Mendip Range*.

The case was tried before Roche J. with the Elder Brethren, and it was found by him that there was no negligence in the navigation of either of the vessels. His decision was affirmed in the Court of Appeal. The present appeal is brought by the owners of the *Mendip Range* to have it decided that the collision was caused by negligence in the navigation of the *Drake*. There was no appeal against the decision that the *Mendip Range* was not to blame. The counsel for

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Viscount Finlay.

the respondent, whilst submitting that he was at liberty to attack for the purposes of this appeal the finding that there was no negligence in the navigation of the *Mendip Range*, disclaimed doing so.

The collision took place at a point distant from half a mile to a mile in a southerly direction from Rue Point in Rathlin, an island off the North-East Coast of Ireland. The *Mendip Range* was bound for Glasgow from Philadelphia, and was on a course of S.E. $\frac{3}{4}$ E. magnetic, making about ten knots, when she sighted the *Drake* distant about three miles on the port bow, and with her starboard side open to the *Mendip Range*. In this position it would ordinarily have been the duty of the *Drake* to keep out of the way, and the duty of the *Mendip Range* to keep her course (arts. 19 and 21 of the Regulations for Prevention Collisions at Sea), but the *Drake*, after sighting the *Mendip Range*, displayed two black balls or shapes, which, under art. 4 of these regulations, are required to be carried by a vessel which from any accident is not under command. The *Drake* was a cruiser of 14,000 tons displacement and about 500 feet in length, and, together with some destroyers, had been escorting a convoy of vessels proceeding eastward by the north side of Rathlin Island. About 9 A.M. on October 2 she was torpedoed about five miles westward of Altacarry Head. The damage done by the torpedo was very considerable. The *Drake* took a list to starboard, the steam-steering gear was put out of action and the telephonic communication was broken, so that the vessel had to be steered by means of a hand wheel, which could be worked only with great slowness and with the help of twelve men, while the orders had to be transmitted through a number of other men stationed at intervals between the bridge and the hand wheel. It was contended for the *Drake* that she was "not under command" within the meaning of art. 4, and bound to hoist the black balls, and that it was, therefore, the duty of the *Mendip Range* to keep out of her way.

After being torpedoed, Captain Radcliffe, who was in command of the *Drake*, determined to take her to Belfast,

and she proceeded on her course for Belfast in a south-east direction from Altacarry Head. But on the report of the engineer-commander that the vessel could not hold out so far as Belfast Captain Radcliffe determined to take her round Rue Point into Church Bay. For some unexplained reason (possibly on account of the suspected presence of hostile submarines) the captain brought the vessel round to her new course, not by porting but by starboarding and coming round the greater part of a circle, an operation which is said to have taken forty minutes. When this turning was completed and the vessel was steadied on her new course she is stated to have been at a point three miles distant from Altacarry Head in a south-east direction. She proceeded for some time on her new course and afterwards ported for the purpose of rounding Rue Point and so getting into Church Bay.

The *Mendip Range* and the *Drake* sighted one another at a distance of some three miles. The Preliminary Act, on behalf of the *Mendip Range*, stated the distance of the other vessel when first seen as about three miles and the bearing as about three points on the port bow, while the Act, on behalf of the *Drake*, put the *Mendip Range* at about three or four miles distant and about six points on the starboard bow; these statements may be taken as approximately correct. The *Mendip Range* was making about ten knots, and the *Drake* about seven. The *Mendip Range* starboarded intending to pass under the stern of the *Drake*, sounding two short blasts, but the *Drake* came round under the port helm with the result that the two vessels converged, the ram of the *Drake* striking the starboard side of the *Mendip Range*. The evidence for the *Mendip Range* was that the *Drake* suddenly ported, thereby bringing about the catastrophe. On behalf of the *Drake*, it was contended that there had been no such sudden porting, and it was asserted that the *Drake* had been for some considerable time under the port helm, and had been gradually coming round.

It is admitted that the *Mendip Range* was not to blame for starboarding, as those on board of her might not have been

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Viscount Finlay.

able at the distance to see that the *Drake* was then coming round under the port helm. The question of the navigation of the *Drake* is, to my mind, a very difficult one. According to the oral evidence from the *Mendip Range*, which is strongly corroborated by the photographs taken at the time of the collision by the young man Potts on board the *Mendip Range*, the *Drake* came suddenly round under the port helm directly before the collision. Roche J. found that the order for port helm action was given on board the *Drake* before there was any alteration on board the *Mendip Range*, by which I understand the learned judge to mean before the *Mendip Range* had come round under her starboard helm. He adds that he is satisfied that port helm action was taken not for the *Mendip Range*, "but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shoal water." Roche J. stated his conclusion at p. 135, letters D to E, as follows :—

"In these circumstances, I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass and would be able to pass clear of her on her port side and to the southward of her, and I do not find the course taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course."

Earlier in his judgment the learned judge described the situation thus : "Therefore it is obvious that a good deal, and, as I find, the greater part of the alteration of the *Drake* occurred at quite a late stage, as I am advised that it is a nautical probability, and I find, as a fact, that although the action of the *Drake* under port helm was taken before the *Mendip Range* herself altered under starboard helm its effect was not such as to become apparent to those on board of the *Mendip Range;* that the *Mendip Range* thereupon starboarded, and the port helm of the *Drake* was adhered to, and that the one vessel so starboarding, and the other vessel so porting, the collision was brought about in the manner previously described."

The finding of Roche J. acquitting the *Drake* of negligence was affirmed in the Court of Appeal. Bankes L.J., after referring to the terms of the judgment given in the Court below, says at pp. 156 and 157 of the appendix: "I think the general conclusion which I draw from the learned judge's judgment is that he did intend to decide, and did decide, this very material question as to whether the *Drake* took port helm action after the *Mendip Range* had starboarded; he intended to decide that in favour of the *Drake*. It is suggested, no doubt, that the action of the *Drake* under her port helm was more marked; she turned more rapidly, or she moved more rapidly under her port helm at the last than she had done at an earlier stage, in the time during which she had been in sight of the *Mendip Range*, but I do not think that he intended to find, and personally I do not think he would have been justified in finding, that there was an alteration of helm in the sense that anyone in charge of the *Drake* gave any fresh helm orders. That is the conclusion at which I have arrived upon this evidence, and in my opinion the view taken by the learned judge, as I understand his view, as expressed by him was right, and I think that the *Mendip Range* cannot be charged in this case with having in any way contributed to the accident, and I think those in charge of the *Drake* were not negligent and were not to blame. The case is one, in so far as she is concerned, of inevitable accident. I think the judgment of the learned judge below was right."

The judgment of Scrutton L.J. is devoted chiefly to the examination of the question whether the *Drake* was justified in hoisting the "not under command" signal, and I think the only passage in his judgment which is relevant to the point which I am now considering is to be found on pp. 160 and 161 of the appendix. It is as follows: "The judge has found that the *Drake*, before the *Mendip Range* altered her course, and when the *Drake* hoisted her two black balls, had an order for port helm, an action not taken for the *Mendip Range*, but for the general purposes of the *Drake* in directing her course to the beach where she desired to anchor in shallow water.

H. L. (E.) 1921

S.S. Mendip Range v. Radcliffe.

Viscount Finlay.

That is to say, being injured, she was taking the course necessary to save herself from injury. That, in my view, was a perfectly proper course for the ship to take, even though she had hoisted two black balls, to try and save herself, even though her means of saving herself were unreliable, and it was under those circumstances the exact course she should pursue when she tried to save herself in that way. Now, so far as one can see, the evidence amply justifies that finding of the judge. If one looks at the chart, and sees where the *Drake* was torpedoed and the course she was proposing to make round, out of the Altacarry Head and Rue Point, and looks at the course of the *Mendip Range* heading towards Fair Head and sees the place where the *Mendip Range* must have been when she saw the *Drake* clear of Rue Point about three miles off, it seems to me an irresistible conclusion that the *Drake* seen at this place and being known to be going to Church Bay must have been then under port helm. It was the only thing she could be doing reasonably to carry out her very proper plan of getting into Church Bay to try and save herself. If so, it is not a case where the *Drake* has, after the *Mendip Range* has committed herself to a course of action, taken an unnecessary course which led to the collision. The *Drake* is carrying out the course necessary to save herself, and the *Mendip Range* has misunderstood it. I agree with the finding that under the peculiar circumstances the *Mendip Range* is not to blame, but I also agree with the judge's finding that the *Drake* was entitled to hoist the two black balls showing she was out of command and entitled to continue the course which she was on before the *Mendip Range* acted in the way she did, to save herself. She was unable, not through negligence, to avoid the collision, but because there was no step that she could have properly taken in the short time that elapsed between the two periods, each observing what the other was doing." The third member of the Court of Appeal, Eve J., said that he was not prepared to say that he would have come to the same conclusion as the trial judge, but that, whatever his own leaning, the learned judge's decision was as likely to be right as a finding

the other way. It therefore appears that in deciding this part of the case the decision of Roche J. and that of the Court of Appeal amount to concurrent findings upon a question of fact substantially on the same grounds.

Our nautical assessors take strongly the view that the *Drake* was in no way to blame. This is, of course, a most important factor in our consideration of a question of navigation. I should, however, add that I think that this opinion was to some extent influenced by the view of the assessors that the *Mendip Range* ought to have been found to blame for starboarding. The question whether the *Drake* was guilty of negligence leading to the collision is to my mind one of extreme difficulty. It does not, however, come before us as if we were a Court of First Instance. We have to deal with the concurrent findings by Roche J. and the Court of Appeal on a matter of fact. I do not think that the facts are clear enough to justify us in disregarding the advice of our nautical assessors and setting aside the concurrent judgments of two Courts which had, each of them, the assistance of nautical assessors. In my opinion, therefore, the appeal against the acquittal of the *Drake* for negligence in navigation should fail.

There remains for consideration the question whether the *Drake* was justified in hoisting the signal that she was "not under command." The fourth article of the regulations so far as applicable to the present case is as follows: "(A) A vessel which from any accident is not under command . . . . shall by day carry in a vertical line one over the other not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter. . . . . (D) The . . . . shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way." It was contended for the *Mendip Range* that the *Drake* was in fact under command and that the signal of the two shapes was therefore improper and misleading. Art. 4 requires that a vessel which from any accident is not under command shall exhibit the signal. The

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Viscount Finlay.

test is the condition of the vessel in point of fact. Is she or is she not under command ?

Two views have been taken of the construction of the article on this point. They are stated by Lord Herschell in *The P. Caland* (1): "In the Court of Appeal the Master of the Rolls expressed himself as follows: 'Now looking at the words of the statute, at the first part of the clause, which speaks of her not being under command, and the second part, her not being under command so that she cannot keep out of the way—taking those two together, it seems to me that the real construction of the rules is, that she must, through some accident, be in such a position that she is not under command in this sense, that she could not keep out of the way of another vessel coming near her. But if she can be steered, and can be stopped, and can go ahead—which is necessary in order that she may be steered—then she is under command, and the apprehension of her being likely (however well founded) to be in a few moments out of command does not shew that she is out of command at the moment spoken of.' And the other learned judges concurred in this view. I cannot but think that this construction is somewhat too narrow. Suppose the vessel, though having steerage way on her and capable of being steered to port or starboard, yet, owing to some disablement, answered her helm but very slowly, so that if an occasion for doing so should arise she could not get out of the way of another vessel in the manner which such vessel would have reason to anticipate. And suppose, though she can stop and reverse, she can only do so after great and unusual delay. I am not satisfied that in either of these cases she might not be properly (2) described as not under command, and not able to keep out of the way of other vessels. It is not necessary to dwell upon the point as it has no application to the present case, but I wish to guard against being supposed to assent to so narrow a construction as appears to me to have been adopted by the Court below." It was not necessary

(1) [1893] A. C. 207, 212–3.

(2) "Probably" in the report, by manifest error.

for Lord Herschell in that case to decide this question of construction, but he clearly indicated the inclination of his opinion. It is now necessary that we should decide the point, as on the construction depends the answer to the question whether the *Drake* was "not under command."

I think that the view indicated by Lord Herschell in the passage which I have quoted is correct. If a vessel is in such a condition owing to an accident that she can only get out of the way of another after great and unusual delay, I think she must be considered as "not under command" for the purpose of art. 4. She is not able to behave as those on board other vessels meeting her would reasonably expect. Both Courts below, with the assistance of their nautical assessors, arrived at the conclusion that the *Drake* was in such a condition. We have consulted our own nautical assessors on the point and they take the same view, and entertain no doubt whatever that this vessel was in such a state that the signal ought to have been hoisted. The construction of the rule is, of course, not for the assessors but for the House. But when that construction has been ascertained the question whether on the facts the disability which the accident entailed on the vessel was such as to put her out of command is one of fact: in most cases it is largely a matter of degree. In my opinion the *Drake* was not under command within the meaning of art. 4 and the signal was properly hoisted.

It was also argued on behalf of the *Drake* that, whether she was in fact out of command or not, those in control of her in good faith and on reasonable grounds believed that she was, and that this justified the hoisting of the signal. Reference was made in support of this contention of the respondent to what was said by Lord Bowen in *The Beryl* (1), in considering the effect of the old art. 18 (now art. 23) as to the duty, "if necessary," to stop and reverse. Lord Bowen said it might be a matter for consideration whether "if necessary" meant if it is actually necessary or only if the captain should reasonably think the necessity had arisen, and in the subsequent case of *The Ceto* (2), Lord Herschell

(1) 9 P. D. 137, 144. (2) 14 App. Cas. 670, 694.

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Viscount Finlay.

said with reference to this article that he agreed "that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time." The doctrine so laid down by Lord Herschell appears to me not relevant to the construction of art. 4. It is quite reasonable to construe a direction to stop and reverse if necessary as having reference to the facts as apparent at the time, and it would be unreasonable to hold the captain in fault because it appears by the light of facts afterwards ascertained that another course would have been better. But such considerations are not applicable to an article which prescribes that if the vessel is not under command a certain signal shall be hoisted. The question is of the condition of the vessel in point of fact and if she is out of control the signal is to be hoisted. Those in control of the vessel are in the best position for knowing whether she is under command or not. If they come to a wrong conclusion on the question of fact the action taken thereon is not justified. That they acted bona fide and on reasonable grounds may affect the question of blame to be attributed to their action or inaction; it has no bearing on the question whether under art. 4 the proper course was taken. The question whether the signal should be made is one between the vessel and other vessels and their rights inter se depend on the language of the article coupled with the facts as they exist. It is a question not whether there was negligence, but whether the signal was required by the article. In the present case indeed this point of the respondent's is not very intelligible. All the facts as to the condition of the *Drake* were perfectly well known to those on board of her. The real charge made against her by the *Mendip Range* was that she acted in hoisting the signal "not under command" on the view of the meaning of the article taken by Lord Herschell and not on the narrower view of its effect which had been adopted in *The Ceto* by the Court of Appeal. If a rule has been misconstrued, it is immaterial to inquire whether there was good faith or reasonable ground for the

misconstruction. In fact, the article was rightly construed by the captain of the *Drake*.

In my opinion this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, during the course of the argument in this case, three questions have emerged for decision by your Lordships. First, whether the ship-of-war, the *Drake*, from the time she was torpedoed, up to the time of her collision with the *Mendip Range*, was, by reason of an accident, out of control within the meaning of art. 4 of the regulations for preventing collisions at sea, which came into force on July 1, 1897. Second, whether the respondent was guilty of negligence in hoisting on his ship the signals prescribed by that article, as soon as he had sighted the *Mendip Range*. Third, whether the respondent was guilty of negligence in rapidly turning his ship to starboard while the *Mendip Range* was acting under her starboard helm, so as to make it impossible for the *Mendip Range* to clear her. Each of these questions is a question of fact. It is, in my opinion, absolutely clear that there was abundant evidence given before the learned judge, Roche J., who tried the case, to justify his finding in favour of the respondent on each of the issues of fact thus raised. The second and third questions may readily, for all practical purposes, be condensed into one—namely, did the respondent on this occasion navigate and manage his ship, even if not under command, in such a faulty, unseamanlike and improper manner, as amounted under the then existing circumstances, to the negligent management and navigation of her? Mr. Laing, on behalf of the appellant, urged in reply, if not before, that there were not concurrent findings in the Courts below on each of these three questions of fact. It is not necessary that the decision of a judge on any question of fact should be couched in any particular form of words. It appears to me to be quite enough if he uses language which clearly conveys the meaning that he decides the question one way or the other; and in my view a judge equally finds upon an issue of fact

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Atkinson.

if he clearly expresses his concurrence with the decision of another judge who has decided that issue.

At page 134 of the appendix Roche J. says: "I am unable to find the person responsible for the navigation of the *Drake* guilty of negligence, because he has taken the view he did and has hoisted the two black balls. Therefore, I arrive at the negative conclusion that I am unable to find, and do not find, the captain of the *Drake* or the navigating officer guilty of negligence for hoisting the 'not under command' signals. Had I found that she was wrongly exhibiting the non-command signals I should have found that it contributed [to the collision he evidently means]. Mr. Aspinall argued that it did not; but I should have so found, because I think it was the cause of the other vessel starboarding." This last statement would appear to me to amount to a clear expression of opinion that the *Drake* was not under command. He then goes on to deal with what he calls the main charge against the *Drake*—"namely, that she failed to keep her course and speed, that is to say, that she improperly ported her helm and allowed her head to go off to starboard. . . . . In these circumstances I am unable to find the *Drake* guilty of negligence because she took that action, she thinking that the *Mendip Range*, having regard to the 'not under command' signal, would shape to pass, and would be able to pass, clear of her on her port side and to the southward of her, and I do not find the course taken, not for the *Mendip Range*, but for the general purposes of the *Drake*, a negligent or improper course." By the words "general purposes of the *Drake*," the learned judge meant the purpose of the *Drake* to get into shoal water where she might anchor in safety.

It is in my mind clear, that by the passages from Roche J.'s judgment which I have cited, the learned judge conveyed, and meant to convey, that he intended to decide, and did then decide, each of the three questions of fact I have mentioned in favour of the respondent. It is next contended that Bankes L.J. did not express himself in such a way as to indicate that he concurred with Roche J. in the decision of each of those questions of fact. Well, I think that that

contention is as unsustainable as the other. He says it appeared to him that there was amply sufficient evidence to justify a finding that the vessel was not under control; that he himself should so find. That he then asked of his assessors the question, "Having regard to the injuries to the *Drake*, did they consider the hoisting of the out of command signals was justified?" That they answered "Yes," and that he entirely agreed with them, adding that it was unnecessary he should add anything more on the question raised by Mr. Laing as to whether the vessel was or was not under control within the meaning of art. 4.

He then adds: "Mr. Laing seems to draw a distinction between the fact of whether she was not under command and whether those in charge of her were justified in considering that she was not under command, but, personally, I cannot see any real distinction. If this Court, or any other Court, were of opinion that the vessel was not in such a condition as to be properly described as not under command, they would not come to the conclusion that those on board were justified in considering that she was in that condition. The Court comes to the conclusion as to whether the officers were justified upon the opinion that they themselves formed as to the actual condition of the vessel."

This passage makes it plain, I think, that the learned Lord Justice concurred with Roche J.'s findings on the first and second questions of fact. He then proceeds to deal with the third question of fact, and, after criticising Roche J.'s words, says that he does not think that the learned judge intended to find that there was any alteration of the helm of the *Drake* in the sense that anyone in charge of the *Drake* gave port helm orders, and then says that those in charge of the *Drake* were not negligent and were not to blame, that the case was one so far as the *Drake* was concerned of inevitable accident, and that he thought Roche J.'s judgment was right. It was not even suggested that Scrutton L.J. did not come, on these three questions, to conclusions practically identical with those arrived at by Roche J. The case, therefore, is one in which there are concurrent findings on the three decisive

H. L. (E.) 1921 S.S. MENDIP RANGE v. RADCLIFFE. Lord Atkinson.

questions of fact. The principle which should guide your Lordships in dealing with such a case is laid down by Lord Herschell with his accustomed clearness and precision in the case of the *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (1), in these words: "I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the Courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding was erroneous. In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the Courts below. I can lay hold of nothing as turning the balance decisively one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the Courts below, that this House would be justified in reversing the judgment appealed from." Lord Watson concurred. My Lords, I think the passage applies strongly to the present case. Even if I felt, which I certainly do not, that if I had been in the place of Roche J. or of that of the learned judges in the Court of Appeal I might have come to conclusions different from those at which they arrived, I should, on these three questions of fact, applying the principle so laid down by Lord Herschell, have felt myself bound not to concur in reversing the judgment appealed from.

In *The Ceto* (2) Lord Herschell lays down another principle which, in my opinion, is peculiarly applicable to the present case. He said, "I quite agree with the Master of the Rolls that rigorous accuracy is not to be expected in the evidence of seamen in cases of this description" (i.e., collision cases). "It would be a mistake to tie them down too rigidly to the letter of their evidence, to the exact number of points that are mentioned, either in relation to the bearing of the other vessel or to the alteration of their course. I think we must treat the

(1) [1893] A. C. 207, 215. (2) 14 App. Cas. 670, 696.

matter somewhat broadly." If that principle be applicable even where duty requires that such matters as those mentioned should be accurately ascertained, how much more forcibly must it apply where accuracy in respect of them is comparatively immaterial. For instance, how can it possibly affect this case whether the *Drake* turned Altacarry Head at a distance from it of three miles or five miles, or whether when she completed her large circle and steadied momentarily she steered a course of S. or S.E. or S.S.E. ? She was steered to turn Rue Point and seek for safety in shallow Church Bay, and care was taken by those in charge of her that, owing to her condition, she should not approach the shore of Rathlin Island too closely. The broad fact is that all her officers and others who were examined on her behalf swore that her helm was ordered to be put 20 degrees to port, and that she came slowly to starboard continuously. It is true that no person was examined to prove that this order was actually carried out, but these witnesses cannot be mistaken as to whether their ship was slowly turning to starboard as if on a port helm all along from the time she had completed her large circle steadied, and made for Church Bay up to the collision. That is an entirely different thing from fixing distances or bearings, or measuring time. If their evidence on this point be untrue, then they must be deliberately forswearing themselves. No judge who has considered this case has accepted this latter theory, and speaking for myself, I do not accept it. Again, it was suggested that if the *Drake* was slowly coming to starboard, during all the time deposed to, she must have gone aground on Rathlin Island or been much nearer to the coast of that island than the place of collision. The place of collision would appear to depend very much on the distance, eastward of this island, of the spot where the *Drake* finished her large circle. There was no object to be gained at the time by fixing the distance of that point from the shore with accuracy.

Of course, once the *Mendip Range* was sighted the captain and crew of the *Drake* were bound to navigate their ship with such care, caution and skill as was reasonable under

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Atkinson.

the circumstances, despite the terrors, apprehensions and anxieties which must have beset them in their perilous endeavour to reach a place of safety.

The captain and crew of the *Drake* were, I have no doubt like all their fellows in the Royal Navy, cool and courageous men; but they were after all human beings, and to most, if not all, human beings life is sweet; and it is in my view not only unjust to them but misleading to ignore the special circumstances under which they acted and treat them as having no perils to encounter, save those which attend in peaceful times ordinary navigation. Yet it appears to me that the argument for the appellants has proceeded very much upon these latter lines.

Mr. Laing insisted very strenuously that a ship to come within art. 4 must, in fact, be out of command and not merely out of command according to the opinion and bona fide belief of her captain, even though in forming that opinion and belief he should have made all reasonable inquiry and examination to ascertain the true condition of his ship, and brought to bear upon the facts so ascertained all the skill and knowledge of a fully competent seaman, so that his opinion and belief were in the result based upon reasonable grounds.

It is obvious that the captain must act on the facts he has ascertained in the manner mentioned and not on facts not known to him, and hoist the signals prescribed by art. 4. He cannot send for experts to examine his ship and advise him if his diagnosis of her condition is sound and right or erroneous. If the captain's diagnosis was right he would be held justified in putting up the authorized signals and treating his ship as not bound to keep out of the way of a crossing ship. If his diagnosis of his ship's condition at the time should possibly twelve months afterwards be in a judicial inquiry proved by the evidence of experts to have been erroneous, then his action, based on the assumption it was not erroneous, would necessarily be held to be wrong and blameable notwithstanding that he acted on a belief and opinion carefully formed and based on reasonable grounds.

For instance, in the present case one of the matters upon which he based his opinion of his ship's condition, was that as her bulkheads were leaking they might under pressure give way, when his ship would sink, or turn turtle, as she afterwards did. But according to the argument, had the *Drake* reached Belfast and on being examined in dock by the dock's experts they disagreed with the captain as to the dangerous and threatening condition of the bulkheads of his ship, he must be held in a court which tried the question and accepted the experts' evidence, to have acted wrongly in hoisting the prescribed signals.

Again, I am not quite sure whether Mr. Laing contended that the captain's culpability must be judged by the facts as they appeared to him at the time he acted, or by some new facts subsequently disclosed. Some light may be indirectly thrown upon this latter point if not upon the preceding one by the provisions of art. 23 of these same regulations, and the judgment of this House in *The Ceto*. (1) This art. 23 provides that: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." The regulation corresponds with the art. 18 of the Regulations of 1884. A question was raised upon the construction of this latter article as to who was to be the judge of "the necessity of doing one or more of these things." In the case of *The Beryl* (2) Bowen L.J., as he then was, said: "It may, however, be a matter of consideration whether 'if necessary' is to be construed as meaning if it is actually necessary, or only if the captain should reasonably think that a necessity has arisen, but even if we were to take the latter as the construction most favourable to the master of the *Beryl*, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to, puts him clearly in the wrong, and obliges us to hold that the *Beryl* was also to blame for this collision." Fry L.J. says (3): "It has been argued that the necessity is to be estimated by the event and

(1) 14 App. Cas. 670. (2) 9 P. D. 137, 144.
(3) Ibid. 145.

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Atkinson.

not by the judgment of a seaman acting reasonably under the circumstances. It is not necessary to decide this point, for from the latter point of view the answer of our assessors shews that the captain of the *Beryl* broke the rule."

In Marsden on Collisions the decision of the House of Lords in the case of the *Ceto* is treated as having decided this question, and held that the rule was to be construed as bearing the latter of these two meanings.

Lord Halsbury said (1): "The question shortly stated is whether two vessels approaching each other and knowing that they were approaching each other, in a dense fog, through which it was impossible to see lights or signals or any part of the vessels by either of them, were not both to blame for not stopping and reversing until they had ascertained more distinctly their respective courses. I quite agree that the solution of that question must not depend upon the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what the condition of facts was. . . . . Each of them was aware, or ought to have been aware, that their approach did involve risk of collision, and the question is whether the facts were such in the knowledge of each that as prudent and reasonable persons those responsible for the navigation of the ship should have stopped and reversed."

Lord Watson says (2): "Whether it was, in a reasonable sense, necessary for the master of the *Ceto* to stop and reverse his engines before the *Lebanon* hove in sight is a question not of law but of fact. His duty in that respect must depend, not upon the result of the whole facts now disclosed in evidence, but upon his own observations of the *Lebanon's* fog signals, and the indications of the position and course of the *Lebanon* relatively to his own vessel, which these observations ought to have conveyed to a prudent seaman of ordinary skill."

Lord Herschell said (3): "The sole question is, whether the *Ceto* should be held to blame in respect of having disobeyed the requirements of art. 18. . . . . This resolves itself into

(1) 14 App. Cas. 673. (2) 14 App. Cas. 685.
(3) 14 App. Cas. 693.

the further question whether under the circumstances, in a dense fog with the indications which the master of the *Ceto* had of the position of the other vessel, he ought by the exercise of reasonable care and prudence to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time."

In the case of the *Beryl* (1), Brett M.R. said: "But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the conduct of people as to unknown circumstances. When you instruct people you instruct them as to what they ought to do under circumstances which are or ought to be before them." This statement of the law was approved by Lord Herschell in *The Theodore H. Rand.* (2) Having regard to this decision, I confess I have difficulty in seeing on what principle, if the captain of a ship injured by accident comes, after due and reasonable examination and inquiry to the conclusion that the facts then by him ascertained constitute reasonable grounds for the belief and opinion that his ship is not under command, he would not be held justified in having hoisted the appointed signals, at all events if the Court before which the question comes for decision concurs with him in thinking that the facts at the time so discovered do afford reasonable grounds for the opinion he has formed, even though facts should subsequently be discovered which would show that the supposed facts upon which he formed his opinion were erroneous. It may well be that the captain's protection is still wider than this and that under the circumstances mentioned he should be held justified in his action, although the Court should hold that the facts known to him at the time he hoisted these signals did not in fact afford reasonable grounds for his act.

It is not necessary to decide either of these questions in

(1) 9 P. D. 137, 138. (2) (1887) 12 App. Cas. 247, 250.

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Atkinson.

the present case, inasmuch as I not only think that the concurrent findings of the Courts below on the three questions of fact I have already mentioned ought not to be disturbed, but in addition because I am of opinion that each and every one of these findings was right. I need hardly say that I thoroughly concur in the opinions expressed by Lords Herschell and Watson in the case of *The P. Caland* (1), as to the proper construction of art. 5 of the regulations. Too much reliance was, I think, placed by the appellants on the enlargements produced of two photographs taken by an apprentice on board the *Mendip Range*, named Potts, as proof of the charge made by the appellants that the *Drake* just before the collision rapidly turned to starboard and made it impossible for the *Mendip Range* by porting to clear her. The sequence of the events stated by Captain Thacker was not accepted by any of the learned judges who dealt with the case. The suggestion that this turning movement was made deliberately by the *Drake* was rejected by all of them. Had it been made deliberately by order it would not only have been wrong and reckless, but in my view almost insane in character on the part of those in charge of the *Drake ;* and if it took place without any change of helm it proves all the more conclusively that the *Drake* was not under command, else why would she answer her unaltered helm so irregularly ? Roche J. endeavoured to reconcile the evidence of the officers of the *Drake* with the statement made by the captain of the *Mendip Range* by suggesting that the porting of the *Drake* was not so effective in the early part of her progress as at the end of it, that most of the effect of the porting took place at the end ; and that the effect of the porting at the earlier stage was not so marked as was or ought to have been apparent to those on board the *Mendip Range.* I cannot say that I regard this explanation as very satisfactory. I do not know if the learned Lords Justices did so. [His Lordship then discussed the evidence of the apprentice Potts who took the photographs and continued :] Neither Roche J. nor the Lords Justices in the Court of Appeal appear to have attached any importance

(1) [1893] A. C. 207.

to these photographs. I think they were right in taking that course. For these reasons I think the appeal fails and should be dismissed with costs.

LORD WRENBURY. My Lords, the construction of the rules relevant to this case is important for its decision and I shall at the outset express my opinion upon it. Art. 19 provides that where steam vessels are crossing, so as to involve the risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. Art. 21 provides that "Where *by any of these rules* one of two vessels is to keep out of the way the other shall keep her course and speed." These rules govern the movements of the keep-out-of-the-way (or giving-way) ship, and of the course and speed (or stand-on) ship. Art. 4 provides for the case of a ship "which from any accident is not under command." She is to indicate her condition by certain signals, and (D) other vessels are to accept them as signals showing them that she is "not under command and cannot therefore get out of the way." The whole effect of art. 4 is to relieve the ship not under command if she be the giving-way ship from the obligation of keeping out of the way. The rules say nothing as to any obligation then arising in the other ship to keep out of the way, but as a matter of seamanship if the one vessel is not able to get out of the way it is the duty of the other to do so. She is not, however, one which "*by any of these Rules* is to keep out of the way" within art. 21. She owes the duty to keep out of the way of a ship which (being not under command) "cannot therefore get out of the way" within art. 4, but her duty in that respect arises not from anything in the rules, but from the duty of good seamanship and from the common law duty of not being negligent. Then what is the duty of the ship not under command? She (if she was the keep-out-of-the-way or giving-way ship) is relieved from the duty of keeping out of the way (art. 4). But there is nothing in the rules to provide that she is to keep her course and speed—or, in other words, to become the stand-on ship. In the nature of things it

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Wrenbury.

would be unreasonable that the rules should provide that she should keep her course and speed, when ex hypothesi she is not under command and may not be in a position so to do. So far as the rules are concerned her duty also is undefined. Her duty arises apart from the rules, and is a duty not to be negligent, to use good seamanship, to do nothing to foil the other vessel in doing the duty which she, as above stated, now owes—to keep out of the way.

To apply these observations to the present case. The *Mendip Range*, when she saw the two black balls of the *Drake*, was bound to know that the *Drake* was relieved of the obligation to keep out of the way, and that she (the *Mendip Range*) had to accept the responsibility of becoming that which otherwise she was not—namely, the keep-out-of-the-way ship. The *Drake*, for her part, did not become a stand-on ship, but owed a duty which, so far as the rules are concerned, was not defined, but which was the duty of good seamanship and of not being negligent. She owed the duty not to do anything to obviate or annul or render dangerous the manœuvre, which the *Mendip Range* now owed the duty to make, to keep out of the way. Importance was attached below to the question whether the *Drake* was really out of command—whether she acted rightly in hoisting the two black balls. It is a question which has no bearing in forming a judgment upon the manœuvres of the *Mendip Range*. By hoisting the signal the *Drake* had said that she was—and the *Mendip Range* was entitled and bound to assume that she was—not under command. As between the two ships the *Drake* must be taken to be that which she said she was. She was bound to play the part of the character which she had assumed. Her duty was not to foil the manœuvres of the *Mendip Range*.

It has been decided (and it is a cardinal fact in the case) that the *Mendip Range* was not to blame. The contention to the contrary was technically open to the respondent, but he has not raised it. I have to start therefore with the established fact that the *Mendip Range* was right in starboarding, was right in continuing to starboard, and was right in being where she was and as she was when the collision took place. The whole

question therefore is whether the *Drake* was to blame for so acting as that she was at the moment of the collision found at the same place. Roche J. found that the *Drake* was not under effective port helm for anything like ten minutes before the collision. He does not, it is true, find affirmatively that she had during those ten minutes altered her helm, but he does find that "it was impossible that there could have been an effective porting for anything like the long period alleged." He finds that "at the time the vessels were at a distance of about a mile there had been no effective porting of the *Drake* from a course of south-west such as would be, was or ought to have been, apparent to those on board the *Mendip Range*. Our assessors tell us that looking at photograph No. 1 and judging by the apparent size of the *Drake* she was about a mile away when that photograph was taken. Up to that time, therefore, according to Roche J.'s finding, there had been no effective porting on the part of the *Drake*. Our assessors also tell us that looking at photograph No. 2 and having regard to the speed, the time that must have elapsed between the two photographs must have been about a minute and a-half. In photo No. 1 the funnels of the *Drake* are closed and from the *Mendip Range* they are seen in a continuous line showing their port sides. The motion of the *Mendip Range* would tend to keep the funnels closed and to cause them to tend to show their starboard sides. In other words the motion of the *Mendip Range* would tend to counteract the opening of the funnels showing their port sides. Notwithstanding this the *Drake* in (say) a minute and a half so altered her heading that the funnels were entirely open, showing their port sides. She had gone round to starboard through a right angle or a little more. This must have been a most effective port helm. Bankes L.J. does not find the same facts as Roche J. He agrees with him that the action of the *Drake* under her port helm was not so appreciable as to throw any blame upon the master of the *Mendip Range* for not realising when he gave the order to starboard that he was starboarding to a vessel then already committed to a port helm. In other words he finds that the *Drake* was

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Wrenbury.

not in the earlier stage turning to starboard at anything like the rate at which she was turning in the last minute and a-half. He also finds that there was no alteration in the helm of the *Drake* in the sense that anyone in charge of her gave any fresh helm orders. But he does not agree with the trial judge as to the *Drake* not being under effective port helm for ten minutes before the collision unless the word "effective" is to be understood as used for vindicating the *Mendip Range* rather than for indicating his view as to the action of the *Drake*. In my judgment Roche J. plainly meant, as indeed he said, that the *Drake* had been discontinuously acting under port helm and that her story of an effective porting for anything like the time alleged was impossible. Bankes L.J. believed and Roche J. did not believe the *Drake's* story of a continuous circuit under a port helm to round Rue Point.

In this state of circumstances the question to be answered is whether the *Drake* so acted as to foil a proper manœuvre of the *Mendip Range*. It is a possible view of the matter that when a ship has declared herself to be not under command the other ship must be prepared for any extravagant and dangerous action on the part of the ship not under command for that she ought to contemplate that possibly the disabled ship cannot control her movements, and from the necessity of the case may do anything extraordinary. If this were so it might result that the *Mendip Range* ought to have contemplated that the Drake either because she could not control her helm or because she was in a sinking condition might be compelled to hug the shore, and that she (the *Mendip Range*) must act accordingly. But this consideration is not open. It is a consideration which if well founded would go to show the *Mendip Range* to be to blame, and she has been held not to blame. No one has contended the contrary before us. What then caused the collision? The answer must be that it was caused by the *Drake* porting to a ship which she knew was starboarding. That she knew it is not disputed. She did not, it is true, hear the sound signal given by the *Mendip Range*, but she saw the two whiffs of steam

as the whistle was blown. Her helm was such as to cause her to go round through at least a right angle to starboard in the last minute and a half. Had her helm been even amidships when the first photograph was taken, there would have been no collision.

The question whether the *Drake* was right in declaring herself not to be under command is, as I have said, immaterial in my opinion in judging the *Mendip Range*. It is not necessarily immaterial in judging the *Drake*. She knew in what respects and to what extent she was not under command. She knew that she had an effective helm, but that it took time to give orders to the helm. She knew that she had the power, and she was using the power to take a course which she thought expedient—namely, a course to starboard to run round Rue Point into Church Bay. But by her signal of "not under command" she had told the *Mendip Range* that she was not a vessel who could command herself. The rules do not leave wholly undefined the meaning of "not under command," for those words are followed by the words "and cannot therefore get out of the way." The fact was that the *Drake* could and did command her course. She unfortunately so commanded it as to produce a collision by porting and continuing to port to a vessel which she knew was starboarding. She was misleading the *Mendip Range* by telling her that she (the *Drake*) could not command her course, while all the time she was commanding it. The appellants' case may be briefly stated thus: "You (the *Drake*) told me you were not under command. But your case is that you were under command in the material particular, that you could and did command your helm and deliberately steered a starboard course to round the Rue Point and get into Church Bay. By so doing you foiled my manœuvre to pass under your stern and so caused the collision." My Lords, I do not see the answer to this contention.

I think the appeal should be allowed and the *Drake* held to blame.

LORD PHILLIMORE. My Lords, the first matter to be

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Phillimore.

determined is whether or not H.M.S. *Drake* was right in hoisting the two black shapes as a signal that she was out of command and could not get out of the way. On this point I feel in some difficulty. The primary step to be taken to get out of the way is to use your helm to turn the course of your ship; and this ship could, slowly perhaps, but still effectively, use her helm, as is shown by the fact that between the time of sighting the *Mendip Range* and the collision, she turned eight points or a right angle. Having regard to this fact and what was said by Lord Herschell with the approval of Lord Watson in the case of *The P. Caland* (1), if I were to act on my unguided judgment, I should say that this vessel was under command, but the great majority of nautical assessors who have advised the three Tribunals, is of an opposite opinion, and the Judges in the Courts below have concurred with them; and this being so, I hesitate to advise your Lordships to act upon my uncorroborated opinion. Before, however, I pass from this point, I have to say that with all respect for those who maintain the contrary, I cannot accept the contention which makes the test of the right and duty to hoist the black shapes, not the very truth of the case, but the opinion which the officer in charge of the damaged ship may form. Here it is to be observed that the rule does not give a licence or permission of which the officer in charge may or may or may not avail himself, but imposes a duty. If the ship is by any accident out of command, the officer must hoist the black shapes, and must thereby signal to other vessels that he cannot keep out of their way. The language of the rule is express that the condition of hoisting the black shapes is the fact and not the opinion of the fact, and this is the way that this very point was dealt with by the noble Lords who gave their opinion in *The P. Caland*. The opinion of the experienced nautical man that his ship was out of command is an element to be considered in arriving at the conclusion whether she was or was not, but has no further importance. With these

(1) [1893] A. C. 207.

preliminary observations I propose to accept, for the purpose of my opinion, the position that the *Drake* was right in hoisting the two black shapes. Perhaps I do so the more easily because it appears to me comparatively immaterial whether she was right or wrong in so doing. If she was right in intimating that she was a vessel out of command, she had to behave as such.

Now it has been said that with regard to the rest of the case, it is wholly a question of fact, as to which there have been concurrent findings in the two Courts below, and therefore one upon which your Lordships would be exceedingly slow to form a different opinion. To me it is not a question of fact, but one of law. For the purpose of deciding this case I am content to take as the only necessary materials (1.) the agreed facts, (2.) the evidence of the captain of the *Drake*, qualified only by the conclusions to be drawn from the photographs and the place of the collision, (3.) coupled with the findings of both Courts below that the *Mendip Range* was not to blame, and (4.) the reasons for holding her not to blame.

Now the captain of the *Drake*, after describing how he had been torpedoed, and the injuries which he had received, and his original idea of going to Belfast, and his giving that up, says that he made a large sweep, nearly a circle under a starboard helm, thus bringing him heading to the southward. When he had finished this sweep under a starboard helm, he does not specifically state where he was with regard to Rue Point, but he must have been to the eastward of Rathin Island, in the sense that he was not as far south as Rue Point; and this is confirmed by the evidence from the *Martin*, who picked the *Drake* up just east of Rue Point (Question 1184) and found that she was at that time already heading south (Question 1218); and by the captain's own idea, though it is admittedly an incorrect one, of the place of the collision. He would therefore have to head for a time to the southward, till he got sufficiently south to clear the point and to be enabled to port to round it, and accordingly he says, as one would expect, that after starboarding, he

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Phillimore.

steadied as near as he could on a southward course (Questions 114 and 116). He adds that when he first saw the *Mendip Range* his heading was south or south by west true (Question 122). If therefore at that moment he was under a port helm, he can only just have begun to be under it, because he was at that moment approximately on the course on which he steadied. Parenthetically it may be observed that this heading which he gives for himself at that moment is the heading which the *Mendip Range* attributes to him, when she first saw him, and that the distances and bearings as given by the two ships work out in substantial harmony. Being thus heading approximately S. by W. and having only just begun, if at all, to swing under his port helm after he had steadied on a southerly course, he continues generally speaking under a port helm till the collision, and turns a right angle. I have said "generally speaking," because Roche J. thinks that it cannot have been a continuous port helm, but only such a port helm as would make that which the captain describes himself as wishing to make, a wide sweep round Rue Point, so as to get into Church Bay, a manœuvre which at any rate with a sound ship would not be accomplished by a continuous port helm, but would require a porting, an easing, a porting, an easing and so forth action. On the other hand the Court of Appeal has accepted his statement to the effect that there was one order to port 20 degrees, never varied or checked till just the moment before the collision when the helm was put amidships. I am, though sceptical, even prepared to accept this statement, only it must be coupled with the agreed facts, which are that in the quarter of an hour or twenty minutes which the captain says (Question 135) elapsed from first sighting the *Mendip Range* to the collision, she had not turned more than a right angle, and had not turned so short as to defeat her intention of rounding the Point, but came into collision almost due south of the Point, and at least half a mile, if not more, from it, and that as the photographs show the alteration at the last was rapid and considerable leaving therefore comparatively little alteration

to be made in the first stages. I may add that on the findings of both Courts and the statement by counsel for the respondent before your Lordships that he was not going to invite you to say that the *Mendip Range* was to blame, the porting during the earlier stages must have been so gradual and so slight as to be imperceptible. Otherwise the *Mendip Range* would have been to blame, either for starboarding, or for continuing to starboard. If it be the case, as suggested for the *Drake*, that the operation of passing the orders was slow, and the operation of complying with the order and getting the wheel over was slow also, it may be thought that if the captain of the *Drake* had just given the order to port 20 degrees when he saw the *Mendip Range*, she would not have turned more than to the extent that she did, even under a continuous port helm, and therefore it might be possible to accept, as the Court of Appeal has done, the statement of the captain of the *Drake* with hardly any or with no qualification.

Now one has to consider whether this continuous porting, developing as it did, was right. When the two vessels first sighted each other the *Drake* had not her black shapes up; and if she had any particular vessel in her mind for which she put them up, it must have been the *Mendip Range*. If she had not put up the black shapes, the officer in charge of the *Mendip Range* would have acted upon the rule with regard to crossing steamships, which imposed upon the *Drake* the duty of getting out of the way, and he would have expected her to get out of the way by porting. His duty would have been to have kept on his course and he would have kept on it. There would have been no collision, and the porting of the helm of the *Drake* in order to reach Church Bay, and the porting to avoid the *Mendip Range* would have coincided. As it was, however, the *Drake* having put up the black shapes the officer in charge of the *Mendip Range* thought, and has been held to be justified in thinking, that it was his duty to get out of the way of the *Drake*, and thought also, and has been held to be justified in thinking, that with the directions of art. 22 of the Regulations for

H. L. (E.) 1921

S.S. MENDIP RANGE v. RADCLIFFE.

Lord Phillimore.

Preventing Collisions at Sea before him, his proper course was to get out of the way by avoiding crossing the head of the *Drake*, that is to say by starboarding. This manœuvre was defeated by the *Drake*, I will not say porting, but I will say in her favour, continuing under a port helm. This continuance, however, under a port helm, was so gradual, in the view of the Courts below, so imperceptible till the last, that there was no negligence on the *Mendip Range* in not observing it, and therefore the collision happened. Now if the *Drake* had not put up her black shapes, and had continued under her port helm there would have been no collision. If, having put up her black shapes, she had relaxed her port helm and kept or even approximately kept the heading at which she was on when these vessels first came in sight of each other, there would have been no collision. It was the unfortunate coincidence of these two things that brought it about. Both Courts below have found the facts as I have described them, but have nevertheless held the *Drake* not in fault—Roche J., on the ground, as I understand him, that the porting and continuing to port of the *Drake* was not a manœuvre taken under the Regulations to avoid the *Mendip Range*, but a course of navigation taken on her own account and irrespective of the *Mendip Range*, to reach her destination. But when the rules provide that a ship shall keep her course—I except cases where the vessels are travelling in a river or narrow channel with sinuous banks —they mean that she shall keep her compass heading till the danger has gone by. Otherwise the other ship could not know what manœuvre to take to avoid her. The *Drake* was not carrying a huge board with a notice that she was going round Rue Point or signalling by flags that she was. Those on board the *Mendip Range* had no reason to think that she was. The master thought that she had been injured, but that she was making for Ballycastle Bay on the mainland (Questions 86 and 206), which would have meant the *Drake* keeping on to the southward and not porting. If a ship, however injured and in a haste to get to a place of safety, manœuvres in a manner that would not have been expected

in the presence of another vessel, that will probably happen which did in this case. The Court of Appeal decided upon very sweeping grounds. Bankes and Scrutton L.JJ. appear to have held that a vessel out of command is under no duty except to notify that she is such. That, if she can manage it, she can port or starboard, go ahead or astern as suits her convenience, and all other vessels must give her the widest berth. It is a preliminary comment upon this view that their Lordships should have been logical and held the *Mendip Range* to blame. But there is a more serious observation.

It was observed by one of your Lordships that there is no article in the regulations directing the navigation by two ships approaching one another so as to involve risk of collision when one is out of command and is showing the proper signals. But as the phrase "out of command" is explained in the regulations as meaning out of command so that she cannot get out of the way, it is obvious that if a risk of collision be imminent, and a collision is to be avoided, the other vessel must get out of the way; and if her duty be not one specifically imposed by the regulations, it certainly is to be inferred from them. If it is not specifically imposed it may also be the case that art. 21, "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed" does not also specifically apply, and if it is not under the rules that the uninjured ship is to keep out of the way, there may be no article requiring the broken-down vessel to keep her course. But just as rules of good seamanship and the inference from the regulations require the other vessel to keep out of the way of the broken-down one, so they require the broken-down one not to defeat the action of the other ship; and the only way in which she can be certain of not defeating it, is by keeping her course, meaning by that the direct line of her compass heading at the time when the vessels ought to begin to act for each other. I am not speaking of cases where a ship owing to her broken-down condition cannot keep her course and will yaw about. Such

H. L. (E.) 1921 S.S. MENDIP RANGE v. RADCLIFFE. Lord Phillimore.

a ship is to be excused, and any approaching vessel should give her a sufficiently wide berth to avoid any danger from a yaw. But if a ship, because she hoists the broken-down signals, is to be enabled voluntarily to alter her course as much as she likes even to the extent of a right angle, regardless of other ships which have to navigate for her, all that is to be said is that she becomes a chartered libertine, "Fœnum habet in cornu. Longe fuge." She is a mad animal, from which all other ships must flee.

In my view the *Drake* should be held to blame and alone to blame for this collision.

Order of the Court of Appeal affirmed, and Appeal dismissed with costs.

Lords' Journals, March 3, 1921.

Solicitors for the appellants: *Downing, Handcock, Middleton & Lewis, for Middleton & Co., Sunderland.*

Solicitor for the respondent: *The Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)* 1921 *March* 4.

LUCAS-TOOTH . . . . . APPELLANT;

AND

LUCAS-TOOTH AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Vesting—Bequest of Stock by Baronet's Son to his Brothers for Life only and then to the Heir to the Baronetcy—Time for ascertaining Heir.

A testator bequeathed any stocks and shares he might die possessed of to be equally divided between his two brothers S. and L., to be held for their lifetime only, "and then to pass to the heir to the Baronetcy at present held by Sir R. L.," or, failing an heir, to the eldest daughter of S.

Sir R. L. had three sons—S., the testator, and L. S. survived the testator (who died a bachelor) and died in the lifetime of Sir R. L., having had issue one daughter only. L. survived his father, and succeeded to the baronetcy, and on his death without male issue the baronetcy became extinct:—

Held (by Lord Birkenhead L.C., Viscount Finlay, Lord Dunedin, and

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

Lord Shaw of Dunfermline; Lord Atkinson dissenting), that upon the true construction of the bequest the heir to the baronetcy was to be ascertained, not on the death of Sir R. L., but on the death of the survivor of the testator's two brothers, and that, there being no heir to the baronetcy on the death of L., the stocks and shares passed under the gift over to the daughter of S.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal affirming a decision of Sargant J.

The appeal raised a question as to the construction of a bequest of stocks and shares under the will, dated August 15, 1914, of Douglas Keith Lucas Lucas-Tooth.

The will so far as material was as follows :—

"The following is the last Will and Testament of Douglas Keith Lucas Lucas-Tooth who hereby bequeaths :—

"1. My estate of Woolumla to my brother Selwyn Lucas-Tooth for his lifetime after which the estate to pass to the successor to the title of Baronet at present held by Sir Robert Lucas-Tooth or failing any such successor to the eldest daughter of Selwyn Lucas Lucas-Tooth or her heirs failing such daughter to the eldest daughter of Leonard Lucas Lucas-Tooth.

. . . . . .

"6. Any stocks and shares that I may die possessed of to be equally divided between my two brothers Selwyn Lucas Lucas-Tooth and Archibald Leonard Lucas Lucas-Tooth to be held for their lifetime only and then to pass to the heir to the Baronetcy at present held by Sir Robert Lucas-Tooth or failing an heir to the eldest daughter of Selwyn Lucas-Tooth failing which to the eldest daughter of Archibald Leonard Lucas-Tooth."

The testator was killed in action in France on September 14, 1914, without ever having been married. He was entitled at his death to various stocks and shares of considerable value. At the date of his death his father Sir Robert Lucas-Tooth was living and was the holder of a baronetcy which had been conferred upon him in 1906. Sir Robert had three sons only —Selwyn, the testator, and Archibald Leonard, commonly known as Leonard and hereinafter so described. Selwyn was

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH.

killed in action in France on October 20, 1914, having had issue one child only, a daughter—namely, the appellant. Sir Robert died on February 19, 1915, and on his death his son Leonard succeeded to the baronetcy. Sir Leonard died on July 12, 1918, having had issue two children only, daughters, and on his death the baronetcy became extinct.

On the death of Sir Leonard the question arose whether he became absolutely entitled on the death of Sir Robert to the stocks and shares bequeathed by the testator, or whether, the baronetcy having become extinct, the stocks and shares passed under the bequest to the appellant, the only daughter of Selwyn, and an originating summons was issued by the respondent Dame Helen Lucas-Tooth, as administratrix with the will annexed of the testator, to determine this question.

Sargant J. held that on the death of Sir Robert Lucas-Tooth Leonard became absolutely entitled to the stocks and shares and his decision was affirmed by the Court of Appeal (Lord Sterndale M.R., and Warrington and Younger L.JJ.).

The respondents to this appeal were the said Dame Helen Lucas-Tooth, the personal representative of Sir Leonard and the trustees of his marriage settlement, the personal representatives of Sir Robert and Selwyn, and Sir Leonard's two infant children, who were interested both under his marriage settlement and under his will.

1920. Dec. 10. *Maugham K.C.* and *Bryan Farrer* for the appellant. There is no general principle of construction that the heir to a title or dignity is to be ascertained at the same time or in the same manner as the heir of an individual. The Courts below have construed the words " heir to the Baronetcy at present held by Sir Robert Lucas-Tooth " as though the words were " heir to the present Baronet," but the two terms are not equivalent, and the inference to be drawn from the reference to the title is that the intention of the testator was to make a bequest for the benefit and support of the title. The express gift to Selwyn and Leonard " to be held for their lifetime only " shows that the testator intended that neither of

them was to take more than a life interest. The terms of the gift over to the eldest daughter of Selwyn also indicate that the testator did not contemplate the possibility of either of his brothers taking under his will as being heir to the baronetcy. The intention of the testator as expressed by the words of the will was that the heir to the baronetcy should be ascertained at the death of the survivors of his two brothers. The well-known classification of the cases by Thesiger L.J. in *Mortimer* v. *Slater* (1) was not intended to be an exhaustive definition of all the meanings of the word "then," and for the reasons above stated that decision does not apply to this particular will. The rule that prima facie the heir is to be ascertained at the testator's death does not apply where there is sufficient evidence of intention to show that the heir is to be ascertained at some other time: Theobald on Wills, 7th ed., p. 340.

[LORD DUNEDIN referred to *Tweeddale's Trustees* v. *Tweeddale.* (2)]

Alexander Grant K.C. (with him *C. Church*) for the respondents other than the children of Sir Leonard.

It is a general rule of construction that an estate shall vest at the earliest possible period. The heir of the testator or of any third person is therefore to be ascertained at the earliest possible date—the date of the person named: *In re Grayson* (3); *Danvers* v. *Earl of Clarendon* (4); *In re Frith* (5); *Mortimer* v. *Slater* (6) affirmed by the House of Lords sub nom. *Mortimore* v. *Mortimore.* (7) The authorities are reviewed in the recent decision of this House in *Hutchinson* v. *National Refuges for Homeless and Destitute Children.* (8) Applying this well settled principle to the will under consideration, the testator meant by the words "heir to the baronetcy at present held by Sir Robert Lucas-Tooth" that the person who at the death of Sir Robert succeeded to the baronetcy should take the stocks and shares, notwithstanding that he

(1) (1877) 7 Ch. D. 322, 329.
(2) (1905) 8 F. 264.
(3) (1879) 48 L. J. (Ch.) 354.
(4) (1681) 1 Vern. 35.
(5) (1901) 85 L. T. 455.
(6) 7 Ch. D. 322.
(7) (1879) 4 App. Cas. 448.
(8) [1920] A. C. 794.

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH.

might be one of the life tenants previously mentioned in the bequest. The heir to a baronetcy is the next successor to the title. There are no sufficient indications in this will to show that the testator intended that the heir to the baronetcy was to be ascertained at any other time than the death of Sir Robert.

Galbraith K.C. (with him *F. D. Morton*) for the remaining respondents. The baronetcy being an incorporeal hereditament, the same rule of construction should be applied as in the case of land: *In re Rivett-Carnac's Will* (1); *In re Whorwood.* (2)

Maugham K.C. in reply. Mr. Hawkins in his book on Wills (1st ed., p. 5), in laying down the general canons of constructions governing the interpretation of wills shows that they do not have such a cast iron effect as is contended for. After stating that the words used are to be taken in their ordinary, proper and grammatical sense, and that technical words must be taken in their technical sense, he says: "Notwithstanding the last two propositions—the intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions." It is contended by the respondents that there is an invariable rule of law that the heir of A. always means heir at the time of A.'s death; but that is not so; it is a question of context: *Locke* v. *Southwood* (3); *Doe* v. *Frost.* (4) Upon the construction of this will the heir was to be ascertained at the death of the survivor of the tenants for life.

The House took time for consideration.

1921. March 4. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal dated April 22, 1920, affirming an order made by Sargant J., on November 27, 1919, on the hearing of an originating summons taken out

(1) (1885) 30 Ch. D. 136, 139.
(2) (1887) 34 Ch. D. 446.
(3) (1831) 1 My. & Cr. 411. Affirmed by the House of Lords sub nom. *Bush* v. *Locke*, ibid. 422*n*.
(4) (1820) 3 B. & Al. 546.

for the purpose of determining certain points of difficulty arising in connection with the estate of Douglas Keith Lucas Lucas-Tooth, who was killed in action on September 14, 1914.

The deceased's father, Sir Robert Lucas-Tooth, was the first baronet, and he had three sons—Selwyn, who was eldest; the deceased, who was the second; and Archibald Leonard, who was the youngest son.

The deceased made his will on August 15, 1914, shortly after the outbreak of war. Sir Robert was then alive and so were his sons, all three of whom were apparently then in the army. Selwyn was married and had one daughter. The deceased never married, and Archibald Leonard subsequently married and had two daughters. Unhappily all three sons were either killed in action, or died of wounds received in action. The deceased died first. Shortly afterwards Selwyn was killed on October 20, 1914. Sir Robert died on February 19, 1915, and was succeeded by Archibald as second baronet. The latter married on January 4, 1916, and died on July 12, 1916, as a result of wounds, and the baronetcy became extinct.

The deceased therefore when he made his will was the second of three sons of a living baronet. He was about to leave England, on active service, and it was within his knowledge that his brothers would also serve in the war, so that he would know that there was no certainty which of them would survive the others. Only two clauses of his will are material, the first and the last. [His Lordship read clauses 1 and 6 of the will.]

At the date of his death, the deceased held a considerable number of shares in various companies, but the details are not material to the questions arising in this appeal.

The issue turns upon the construction of clause 6, and its application in the events which happened.

Sargant J. held that Archibald on the death of Sir Robert became absolutely entitled to these shares, and his decision was upheld by the Court of Appeal.

The reasoning upon which the judgments in the Courts

H. L. (E.) 1921 — LUCAS-TOOTH v. LUCAS-TOOTH. — Lord Birkenhead L.C.

below were based is that in the absence of words in the will to the contrary there is a principle of law that property given by will shall vest at the earliest possible moment, and that as there was nothing in the will which prescribed a different period of vesting, the gift became vested at the earliest moment that the heir to the Lucas-Tooth baronetcy was ascertained—namely, on the death of Sir Robert. The result of this would be to vest the shares absolutely in the second baronet.

In so deciding great reliance was placed on the well-known judgment of Thesiger L.J. in *Mortimer* v. *Slater*. (1) The decision in that case was afterwards affirmed by this House sub nom. *Mortimore* v. *Mortimore*. (2)

My Lords, the principles of construction applicable to gifts of personalty to a class, following a gift to other persons, have so recently been examined by this House, in *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (3), that it is unnecessary to discuss them in detail here. It is sufficient to add that there is no distinction in principle in this respect, between a bequest of personalty to next-of-kin and a devise of realty to the heir-at-law, although cases of the latter class could not arise until such a devise was made effective. There was indeed, early authority for this, in the well-known case of *Danvers* v. *Earl of Clarendon* (4), where personalty was bequeathed to a lady for life, and after her decease to the heir of a man who survived the testator but pre-deceased the legatee. In that case it was held that the heir was ascertained at the death of the person whose heir was to receive the legacy. To the same effect is *In re Grayson*. (5) My Lords, I do not desire to say anything that would tend or be likely to throw any doubt upon this well-settled principle. I would, however, remark that, notwithstanding the authority in general of the judgment of Thesiger L.J. in *Mortimer* v. *Slater* (1), I do not regard his classification as exhaustive. There may well be cases which do not fall within any of the three classes which he gives.

(1) 7 Ch. D. 322, 329, 330.
(2) 4 App. Cas. 448.
(3) [1920] A. C. 794.
(4) 1 Vern. 35.
(5) 48 L. J. (Ch.) 354.

And indeed, I deprecate the attempt in the construing of a will, to place a commonly employed English adverb within a strait-waistcoat. The word "then" is one of infinite finesse, flexibility and variety. A painstaking and very elaborate analysis might no doubt exhaust the senses in which it may be employed with literary correctitude, but an attempt to limit its use founded upon an examination less thorough may easily, by grafting artificiality upon artificiality, undermine rules which are fundamental.

Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases—that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.

Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention.

When this will is so looked at it becomes obvious that while the testator's mind was affected by the uncertainty of succession to the baronetcy his intention was to endow the baronetcy with the shares in question. His primary object was to benefit his brothers while they were alive, and when that was accomplished, to benefit the holder of the baronetcy, if there were one. I cannot but conclude, looking to the will as a whole, that it was his intention to find the beneficiary at the date when his gift to his brothers had ceased to be effective, and that by the words "the heir to the baronetcy," he did not mean or intend the person who should succeed on the death of Sir Robert, but that person whoever he might be who should be the holder for the time being of the baronetcy held by Sir Robert at the date of the will. If there were no such person then the daughter of Selwyn

H. L. (E.) 1921

LUCAS-TOOTH v. LUCAS-TOOTH.

Lord Birkenhead L.C.

was to be preferred, as he makes clear by the latter part of the clause.

The interpretation placed upon the clause by the Courts below defeats that intention. On the death of Sir Leonard there was no baronetcy to endow or maintain and in that event, which in my view was contemplated by the testator, it was his clear expressed intention that the appellant should have the shares in question.

Having regard to the opinion I have formed of the construction of this particular will, it is not necessary for me to add more than one observation. Nothing that I have said impairs in any way the principles of construction which are indeed by now too well established to be affected except by legislation. I do not differ from them, for, in my judgment, their true application leads to the conclusion which I recommend. I am of opinion that the appeal must be allowed and I so move your Lordships.

VISCOUNT FINLAY. My Lords, this case raises a question on the construction of the will of Douglas Lucas Lucas-Tooth, who died on September 14, 1914, on active service abroad.

He was the son of Sir Robert Lucas-Tooth, the first baronet. Sir Robert had three sons—Selwyn, Douglas (the testator) and Archibald Leonard. The testator (Douglas) died on September 14, 1914. Selwyn died also on active service on October 20, 1914, leaving a daughter but no son. Sir Robert died on February 19, 1915, and the baronetcy then passed to Archibald Leonard, the surviving son, who died on January 12, 1918, in consequence of wounds sustained in the war, and as he left no male issue, the baronetcy, upon his death, became extinct.

The will of Douglas is dated August 15, 1914. So far as material, it is as follows: [His Lordship read clauses 1 and 6.]

The dispute is whether under this will the corpus of the stocks and shares passed to Archibald Leonard, who became heir to the baronetcy on the death of Sir Robert, in which case they now belong to the persons claiming under a settlement made by him, or whether, there being no heir to the

baronetcy upon the death of Leonard, the stocks and shares pass to the eldest daughter of Selwyn under the terms of the sixth clause in the will. In other words, the question is whether the words in the sixth clause, " and then to pass to the heir to the baronetcy at present held by Sir Robert Lucas-Tooth " denote the person who inherited the baronetcy upon the death of Sir Robert Lucas-Tooth—namely, Leonard, so that he had not only the life interest but also the absolute interest, or whether the question of there being an heir to the baronetcy fell to be determined on the death of Leonard himself. Sargant J. and the Court of Appeal (Lord Sterndale M.R. and Warrington and Younger L.JJ.) held that the stocks and shares passed to Leonard, and therefore belong to those who claim under the settlement. Younger L.J. expressed in strong terms the reluctance with which he arrived at this conclusion, as he said that he was fully conscious of the extraordinary results which might follow from it.

I think that the construction put upon the will in the Courts below is not in accordance with the meaning of the testator as expressed in the will, and that there is no rule of construction which compels any Court to put on the words of this will any sense other than that which they naturally bear.

The sixth clause first gives the stocks and shares to Selwyn and Leonard " to be held for their lifetime only and then to pass to the heir to the baronetcy at present held by Sir Robert Lucas-Tooth or failing an heir to the eldest daughter of Selwyn Lucas-Tooth." In my opinion the natural meaning of these words is that the stocks and shares are to go on the expiry of the life interests to the person who is then by inheritance the holder of the baronetcy which, at the time of the testator's death, was held by Sir Robert Lucas-Tooth, or, failing any such holder, to the eldest daughter of Selwyn.

The judgments in the Courts below treat the words of bequest to " the heir to the baronetcy now held by Sir Robert Lucas-Tooth " as equivalent to a bequest to " the heir of Sir Robert Lucas-Tooth," and go on to apply to this bequest authorities

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH. Viscount Finlay.

which might have been applicable to the case of a bequest to "the heir of Sir Robert Lucas-Tooth." These two forms of bequest seem to me not to be equivalent to one another, but very different. The words of this bequest must be construed according to their natural meaning and not by the light of authorities which would be binding only if the bequest were in a different form.

"The heir of Sir Robert Lucas-Tooth" would denote the person who, upon the death of Sir Robert Lucas-Tooth, became his heir, unless the provisions of the will show that "the heir of Sir Robert Lucas-Tooth" is to be ascertained as if the latter had died at a date other than that at which his death in fact took place. There is a multitude of authorities deciding in particular cases of this kind whether the words of the will show an intention that the heir of a person should be ascertained at a date other than that of his actual death.

The bequest with which we have to do is not to "the heir of Sir Robert Lucas-Tooth," but to "the heir to the baronetcy at present held by Sir Robert Lucas-Tooth." The person who is to take the stocks and shares is denoted by reference to the dignity which he has inherited, not by reference to the person on whose death the inheritance passed to him. Sir Robert Lucas-Tooth's name is introduced into the clause simply to identify the baronetcy as being that which at the date of the will was held by him. It does not denote that "the heir to the baronetcy" is to be "the heir to Sir Robert Lucas-Tooth." The words used would apply to a succession to the baronetcy on a death subsequent to that of Sir Robert Lucas-Tooth himself. The words of the bequest are applicable to any person who by inheritance succeeds to the baronetcy, whether on the death of Sir Robert Lucas-Tooth or on the death of a subsequent holder. There is no presumption whatever that these words denote the person who took immediately on the death of Sir Robert Lucas-Tooth, and none of the cloud of cases on this branch of the law have any relevance to the language of the present will.

It is when the life interests in the stocks and shares come

to an end that "the heir to the baronetcy" who is to take them has to be ascertained, and if there is then no such heir the bequest to the eldest daughter of Selwyn "failing an heir" takes effect. The sixth clause says in terms that the stocks and shares given to Selwyn and Archibald Leonard are "to be held for their lifetime only." The word "only" would be mere surplusage if all that it meant was that the bequest for life was only for life, as has been suggested. The frame of the clause imports that the testator contemplated that his brothers were to have under his will no more than life interests in these stocks and shares. If there were found in the will a further gift of the corpus to either of these brothers it would show that the testator meant nothing by the word "only," and that it was mere surplusage. But the question is whether there is such a further gift of the corpus, and the fact that the testator says that his brothers were to hold for their lifetime only tends against the view that by the immediately following words he gave the corpus.

Is there any such subsequent gift of the corpus? The will goes on to state what is to happen to the stocks and shares on the death of the two brothers of the testator: "and then to pass to the heir to the baronetcy at present held by Sir Robert Lucas-Tooth or failing an heir to the eldest daughter of Selwyn Lucas-Tooth." The word "then" denotes the lapse of the life interests. When that event happened the stocks and shares were to go over to the heir to the baronetcy, if there was one, and, failing an heir, to the eldest daughter of Selwyn.

The bequest is not to "the heir of Sir Robert Lucas-Tooth," which would prima facie mean the person who took on his death. It is to "the heir to the baronetcy," and these words are quite apt to denote any person who, when the life interests failed, should be by inheritance entitled to the baronetcy. The natural time for ascertaining this is the date when the life interests lapse, and there is nothing to point to any other date. The fair effect of the clause is that the stocks and shares go to the eldest daughter of Selwyn if the baronetcy is extinct when the life interests come to an end. On that event the

H. L. (E.) 1921 — LUCAS-TOOTH v. LUCAS-TOOTH. — Viscount Finlay. —

baronetcy was in fact extinct and the daughter of Selwyn takes.

The Courts below adopted another construction in deference to the cases which on their view compelled them to consider the will as giving the stocks and shares to Archibald Leonard as the person who had inherited the baronetcy on the death of Sir Robert Lucas-Tooth.

Sargant J. refers to two cases: *Mortimer* v. *Slater* (1) and *In re Grayson.* (2)

In *Mortimer* v. *Slater* (1) Thesiger L.J. gave a classification of the cases in which words of futurity are used in the will as to ascertaining the class of next of-kin. The correctness of this classification and the principle which the Lord Justice based upon it are beyond dispute. The heir or the next-of-kin mentioned in the will are ordinarily to be ascertained at the death of the testator. But if there are words showing that they are to be ascertained at a later date, effect must be given to these words. This leaves open the question whether upon the construction of any will the ascertainment is to be at a date other than the death of the testator. As Sargant J. himself said, the question is whether there is something in the will which prescribes delay in the date to be taken for ascertaining the heir.

In the other case, *In re Grayson* (3), all that was decided is expressed in the words of Fry J. himself, at the conclusion of his judgment: "In my own opinion the circumstances of this particular will are not sufficiently strong to interfere with the well-recognised rule of law that the heir is to be ascertained at the earliest possible period." The gift was to the right heir male of A. and his heirs.

In the Court of Appeal in the present case the Master of the Rolls held that there was nothing in the will to prevent the application of the rule that would apply if the words were "the heir to Sir Robert Lucas-Tooth," and that the heir must therefore be ascertained at the time of the death of Sir Robert Lucas-Tooth. He recognizes that "this

(1) 7 Ch. D. 322.
(2) 48 L. J. (Ch.) 354.
(3) Ibid. 354, 355.

construction may lead to difficulties or to what perhaps may be called absurdities," but says that that consideration is not enough to get over the plain words of the document.

Warrington and Younger L.JJ. reached their conclusion upon similar grounds.

I have already given my reasons for thinking that decisions of this kind have no relevance to the present case, as the bequest is not to the heir or next-of-kin of any one. It appears to me that on the true construction of the will a result is reached in accordance with the obvious intention of the testator which prevents the occurrence of any of the difficulties and absurdities referred to as incident to the construction which the Court of Appeal felt constrained to adopt.

Hutchinson v. *National Refuges* (1) was decided in May, 1920, a few weeks after the decision of the Court of Appeal in the case now before the House. In *Hutchinson's Case* all the authorities relied on in the Court below in the present case were subjected to a very elaborate review. This would make it unnecessary to consider them further on the present occasion, even if they could be considered as having any relevance to the language of this case.

The question always comes back to the construction of the particular document. For the reasons I have given, I think that the intention of the testator as expressed in the will is clear, that his brothers were to have only life interests, and that, if on failure of these life interests the baronetcy was extinct, the daughter of Selwyn was to have the property now in dispute.

In my opinion the judgment of the Court below should be reversed.

LORD DUNEDIN. My Lords, I concur in the opinion of the Lord Chancellor. The difference between this case and any of the cases which, in the opinion of the Courts below, laid down a hard-and-fast rule of determination which compelled to a certain result, is that the person preferred here is not the heir of a person but the heir to a baronetcy.

(1) [1920] A. C. 794.

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH. Lord Dunedin.

Prima facie the heir of A. is the person who holds that character when A. dies. If, however, the period of distribution is owing to the interposition of a life interest or by explicit direction postponed, and it is clear that the favoured person is only to be sought at the time of distribution, then it is legitimate to hold that the prima facie meaning is displaced and that the person indicated is he who would have the character of heir of A. if A. had really died at the date of the period of distribution. Everything, therefore, turns as Thesiger L.J. put it in *Mortimer* v. *Slater* (1) (for I do not read his judgment as a monograph on the word "then"), on its being clear from the words used that the person is to be found, or the class selected, only when the succession opens.

Now the heir to a baronetcy is a roving title or description; it is not the same expression as the heir of the baronet A. There is, therefore, no prima facie meaning to be displaced; and the only means of selection pointed at is to take the time when the succession opens.

Holding these views I am of opinion that our judgment in this case will neither unsettle the law, nor do despite to the rules laid down in the cases quoted; and that the result arrived at is in accordance not only with the obvious wishes of the testator but also with the words he has used to carry out those wishes.

LORD ATKINSON. My Lords, I regret that I am unable to concur with the judgments which have been delivered by my noble and learned friends who have preceded me. The authorities I think establish that the governing consideration in the construction of all wills is the intention of the testator as revealed by his language, the words of his will. These words must be taken in their natural and primary meaning, unless there be some provision or passage in the will to show that the testator used them in a sense other than and different from their natural and primary sense. In the construction of the will the special sense in

(1) 7 Ch. D. 322.

which the testator used these words must, if possible, be given effect to. There is, in my view, no unyielding rule of construction as to the meaning to be attributed to the word "then" when found in a will. It may be held to mean "at that time" or "in that event," according as the language of the will, taken as a whole, shows that the testator used it in the one of these senses or the other: see *Hood* v. *Murray* (1); *Sturge and Great Western Ry. Co.* (2); *Hutchinson* v. *National Refuges for Homeless and Destitute Children.* (3) It is clear, and, as I understood, is admitted, that under the first clause in the will the real estate would pass, in the events which have happened, to the testator's younger brother on his succeeding to the baronetcy on the death, on February 19th, 1915, of his father, Sir Robert Lucas-Tooth. And it is, as I understood, not disputed that had the testator's elder brother, Selwyn, survived his father and succeeded to the baronetcy on the father's death, the estate would have passed to him notwithstanding that a life interest in it had been devised to him. Such is the force of the word "successor."

My noble and learned friend Lord Finlay is of opinion that if the bequest in the sixth clause of the will had been "to the heir of Sir Robert Lucas-Tooth" instead of as it is, 'to the heir to the baronetcy now held by Sir Robert Lucas-Tooth," the corpus of the fund would, in the events which have happened, have passed to the younger brother, Archibald Leonard, on the death of his father, notwithstanding the fact that the life interest in the entire fund then belonged to him. The authorities show that this latter circumstance would not affect the matter.

The Master of the Rolls, after quoting with approval the rule laid down in Theobald on Wills to the effect that "if the gift is to the heir of a testator, the heir must be ascertained at the date of the death of the testator though the gift to the heir is after a life interest to the person who is the heir," says in the last page of his judgment :—

(1) (1889) 14 App. Cas. 124, 137. (2) (1881) 19 Ch. D. 444, 449.
(3) [1920] A. C. 794, 811, 815, 817.

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH. Lord Atkinson.

"Possibly, if one were left without authority and had to consider whether the preceding life interest would go to show that the person called 'the heir' was not intended to be the same person, one might have to consider it, but it is not open to consideration—it has been decided so clearly that I do not think it can be discussed at all. Therefore it seems to me that the whole question in this case comes back to this: Whether the words . . . . 'the heir to the baronetcy at present held by Sir Robert Lucas-Tooth,' used in the connection in which they are in this will, show that something else was intended from that which would result if the words were '. . . . the heir to Sir Robert Lucas-Tooth.' In my opinion, they are not enough. No doubt they are not quite the same in meaning, because the heir to Sir Robert Lucas-Tooth might possibly be a person who would not inherit the baronetcy. I think that the real meaning of them—I agree that they are an informal and colloquial form of expression—as used by any ordinary person would be 'the person who succeeds to the baronetcy on the death of Sir Robert Lucas-Tooth.'"

The words in the first clause, "successor to the title of baronet at present held by Sir Robert Lucas-Tooth," closely resemble the words, "the heir to the baronetcy at present held by Sir Robert Lucas-Tooth," used in the sixth clause.

No doubt the words "at present held by Sir Robert Lucas-Tooth" are merely descriptive of the baronetcy. It is, however, I think, clear that the purpose and intention of the testator was to endow, as it were, the baronetcy with the absolute interest in these stocks and shares subject to the life interests in them which he created by his will. The only way in which that intention can be effectuated is by giving the corpus of this fund to the person who succeeds to the baronetcy after the death of Sir Robert Lucas-Tooth. The person who is heir "apparent or heir presumptive to a baronetcy" is, I presume, the person who would succeed to it if he should outlive the actual holder of it. But this heir may die in the lifetime of the holder, and never succeed to the baronetcy at all.

It would appear to me to be impossible to hold that the testator intended that the absolute interest in this property subject to the life interests should vest in a person who never succeeded to the title. For instance, if the children of Archibald Leonard had been sons instead of daughters or if during his father's life a son had been born to him, the elder of the two sons in the former case and the only son in the latter case would be the heir to this baronetcy to which his father had succeeded in July, 1915, and he himself might never succeed to the baronetcy at all. I cannot think that the testator ever intended that his brother, though he succeeded to the baronetcy, should have nothing beyond a life interest in these stocks and shares, and that this nephew, his brother's son, who might never succeed, should have the corpus of the property subject to that life interest. The mere fact that Archibald Leonard who now has succeeded to the baronetcy is entitled to a life interest in these stocks and shares cannot, I think, on the authorities exclude him from taking the benefit of what was intended to be an endowment of the title to which he has succeeded.

On the whole, therefore, I concur in opinion with the Master of the Rolls, that the heir to the baronetcy must be construed to mean "the person who succeeds to the baronetcy on the death of Sir Robert Lucas-Tooth." Any other construction would, I think, defeat the plain object and intention of the testator.

I think the unanimous judgment of the Court of Appeal was right, and that this appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the dates and family details affecting this case have been given in the judgments of your Lordships.

I agree that the appeal must be allowed.

It is plain that the decision of some of the judges in the Courts below was reached with that reluctance which springs from a sense that the meaning put upon the words used in the testator's will is not the meaning which he had in his

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH. Lord Shaw of Dunfermline.

mind. But when the learned Master of the Rolls states that although a possibly absurd conclusion might result from the construction adopted yet that this is unavoidable because of "the plain words of the document," then, although I lean towards the view that the words clearly do not mean what the Courts below have found, I content myself with saying that at all events the words are not plain. No deference to them in that sense can be demanded.

Where in the clause under construction the testator used the words "the heir to the baronetcy," I think that the words must be taken just to mean what they say, and that they do not say nor do they necessarily mean the heir to the baronet; they mean the person who is entitled to succeed by inheritance to the baronetcy. Failing such a person, the destination is to the eldest daughter of Selwyn Lucas-Tooth, that is to say, to the appellant.

When the second of the three sons of Sir Robert Lucas-Tooth, baronet, made his will, the heirs to the baronetcy were within the circle of himself and his two brothers and their possible male heirs. He died leaving his two brothers surviving him. The will, therefore, speaking a morte referred to the narrowed circle of the two brothers and their possible male heirs. But with regard to these brothers themselves, the testator had clearly confined the succession to his stocks and shares as "to be held for their lifetime only." When that circle unhappily vanished by the death of both these brothers without male issue, the stocks and shares were "then to pass to the heir to the baronetcy" (there was no such heir and Sir Robert the father himself had died and the baronetcy was extinct); and the words of the will accordingly apply "or failing an heir to the eldest daughter of Selwyn." Those words exactly fit the events as they have occurred; and in my opinion this lady rightfully succeeds.

I am not debarred from this conclusion by any magic quality in the adverb "then." When the words of the will say "to be held for their (the brothers') lifetime only and then to the heir to the baronetcy or failing an heir to the eldest daughter of Selwyn," one asks oneself: "When?

What is the point of time, at which the heir to the Baronetcy, if any, is to be sought for ? " and the will answers the question sufficiently by showing that it is at the expiry of the brothers' life interest. I do not have any doubt that the testator meant it so.

But the opinion of Thesiger L.J. in *Mortimer* v. *Slater* (1) is said to have arrested our construction of the word " then " and turned it into an artificial and different channel. But, my Lords, " then " is not a word of art. It is a common adverb, with a variety of reference and sometimes used adjectivally.

My Lords, there are two things in construction which ought to be avoided. The first is the danger of misplaced analogy, and the second is the treatment of a stated category as necessarily exhaustive of the possibilities of signification of a term employed. Both of these dangers occur in the present case. The analogical application of a meaning given to a word or expression in one document to a similar word or expression in another different document presents a familiar danger. The very collocation of a word in a clause, or of a clause in a series of clauses, may raise the plainest presumptions that—the collocation differing—the meaning should differ, in the one case from the other.

While, as to the second point, a stated category of cases into which the different senses in which a word or expression may be held to fall, is no doubt a guide to the mind in a work of construction when the subsumption is plain. A word of art may quickly be ranked up accordingly. But when a category or enumeration, ventured upon even by high authority, is sought to be imposed upon a simple and common word of the English language, courts of interpretation must preserve their freedom of contact with the mind and meaning to be interpreted, that mind having used the medium of unartificial and ordinary speech.

To treat categories which arise as generalizations in one case as necessarily applicable to and inclusive of all cases, and then further to treat the words as falling within the categories according to a pre-allotted meaning, may be

(1) 7 Ch. D. 322, 329.

H. L. (E.) 1921 LUCAS-TOOTH v. LUCAS-TOOTH. Lord Shaw of Dunfermline.

destructive of true interpretation. Words themselves change in meaning; even punctuation, or the order in which things are set down, may have its significance; and the nuances of expression have an infinite variety. Out of these categories or generalizations, you may no doubt construct a machine which would stamp ordinary words with a meaning which their author would promptly disavow. The generalization becomes a category, the category becomes a rule, and the rule becomes a bed of Procrustes upon which words and expressions must be stretched, but which, as one is unhappily conscious, they can only be made to match by torture or by mutilation. The meaning of the testator is not thus reached; truth is therefore sacrificed, and misinterpretation results.

I think the present case to be an instance of that, and I venture respectfully to agree with the opinion of my noble and learned friend on the Woolsack upon this topic.

Order of the Court of Appeal, so far as complained of, reversed: Declared that upon the true construction of the will and in the events which have happened, the appellant became absolutely entitled to the stocks and shares in the bequest mentioned, upon the death of Sir Archibald Leonard Lucas-Tooth. The costs of all parties in respect of the appeal to this House to be paid out of the stocks and shares not settled by Sir Archibald Leonard Lucas-Tooth, to be taxed as between solicitor and client. Cause remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this order.

Lords' Journals, March 4, 1921.

Solicitors for the appellant: *Lee & Pembertons.*

Solicitors for the respondents other than the daughters of Sir Leonard: *Thompsons, Quarrell & Jones.*

Solicitors for the remaining respondents: *Collyer-Bristow & Co.*

[HOUSE OF LORDS.]

MOUNTAIN . . . . . APPELLANT ; H. L. (E.)*

1921

AND

WHITTLE . . . . . RESPONDENT. *March* 4.

Insurance, Marine—Time Policy on Houseboat at Anchor—"Liberty to shift—"Including all risk of docking"—Houseboat being towed to Dock—Loss through Peril of Sea—Abandonment of insured Adventure.

A time policy of marine insurance on the plaintiff's houseboat "whilst anchored in a creek off Netley, however employed, with liberty to shift," against the usual perils contained a clause: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." The vessel was at the time anchored in the river Hamble, Southampton Water, which, it was agreed, came within the words "in a creek off Netley." During the currency of the policy the plaintiff desired to have the houseboat cleaned and her under-works examined for repairs, and he arranged to have her towed by a low-powered tug from the Hamble up Southampton Water to a yard on the river Itchen above Southampton Docks, a distance of about seven miles, and to have her placed on a gridiron there. This yard was the nearest and most convenient yard with a gridiron. Both the river Hamble and the yard were within the port of Southampton. The tug was not available on the day fixed for the towage, and a larger tug was sent, and the houseboat was lashed alongside the tug and thus towed to the yard. On arrival in the Itchen about four feet of water were found to have entered the houseboat, and she continued to make water and sank outside the yard. It was found that some of the side seams above the water line were defective and had opened, and the bow wave made by the tug and tow raised the water to the level of the defective seams, and the water entered and caused the sinking. The plaintiff did not know that the seams were defective. The towage was performed in the manner usual in Southampton Water. At the time when the houseboat left the Hamble the plaintiff did not intend to take her back during the currency of the policy, but to lay her up in the Itchen.

In an action on the policy:—

Held, (1.) that the taking of the houseboat to the yard on the Itchen was authorized by the docking clause of the policy, and that therefore the vessel was covered when the loss occurred; (2.) that the vessel was lost through a peril of the sea; (3.) that the plaintiff had not at the time of the loss abandoned the insured adventure.

Semble, the clause giving liberty to shift did not authorize the taking of the vessel to the yard.

Decision of the Court of Appeal [1920] 1 K. B. 447 affirmed.

---

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, and LORD SUMNER.

H. L. (E.) 1921 MOUNTAIN v. WHITTLE.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Bailhache J.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

1921. Feb. 10, 11. *R. A. Wright K.C.* and *R. I. Simey* for the appellant.

1. The loss was not due to perils of the sea. This ship was unseaworthy, but the policy being a time policy and the respondent having no knowledge of the unseaworthiness of the ship, the appellant concedes that he cannot rely on the unseaworthiness as a defence to the respondent's claim. Nevertheless, there was no evidence to justify Bailhache J. or the Court of Appeal in finding that the loss of the ship was due to perils of the sea. There was no weather nor any other fortuitous circumstance contributing to the incursion of the water, which was due to the condition of the vessel itself: Marine Insurance Act, 1906, First Sch.; "Rules for Construction of Policy," r. 7; Arnould on Marine Insurance, 9th ed., vol. ii., s. 812; *Sassoon* v. *Western Assurance Co.* (2); *Grant, Smith & Co.* v. *Seattle Dry Dock Co.* (3)

[VISCOUNT HALDANE referred to *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (4)]

2. Neither the shifting clause nor the docking clause covered the ship while being moved from the Hamble River to the graving dock. The words "whilst anchored in a creek off Netley" control the whole policy and exclude any risk which is not incidental to such an anchorage: *Pearson* v. *Commercial Union Assurance Co.* (5)

3. On the evidence the respondent at the time of the loss had abandoned the insured venture.

Leck K.C. and *L. C. Thomas* for the respondent were not called upon.

The House took time for consideration.

(1) [1920] 1 K. B. 447.
(2) [1912] A. C. 561, 563.
(3) [1920] A. C. 162, 170.
(4) [1918] A. C. 350.
(5) (1876) 1 App. Cas. 498.

1921. March 4. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an Order of the Court of Appeal dated November 7, 1919, affirming the judgment of Bailhache J. in favour of the respondent.

The respondent's claim was for a partial loss under a policy of insurance subscribed by the appellant and covering the houseboat *Dorothy*.

The issues which require decision are, in general, whether the damage sustained by the *Dorothy* was caused by a peril insured against and whether the *Dorothy* was covered by the policy at the time of the loss.

The facts are simple and may be shortly stated. The *Dorothy* was bought by the appellant in the summer of 1915, fitted out as a houseboat, and used as a residence for himself and his family. In January, 1918, she was let to Messrs. James, a firm of contractors who had undertaken to raise a sunken vessel, and who required accommodation for the men engaged in this task. Messrs. James towed the *Dorothy* to the Hamble River, where she remained with their men on board till the early autumn of 1918, when they gave up possession in pursuance of a notice from the respondent dated June 22. When the workmen left, the *Dorothy*, being in a dirty condition, required cleansing and renovation before the respondent could reoccupy her. The necessary repairs required that she should be docked and put on the gridiron. Messrs. Camper and Nicholson's yard at Northam, about 7½ miles away, was the nearest place where the *Dorothy* could be docked. There was no place nearer or more suitable.

The respondent had engaged a small tug called *The Test* to tow the *Dorothy* to the repairing yard above mentioned, but at the appointed time *The Test* broke down and the deputy dockmaster sent the tug *Dorrington*, a much larger and more powerful tug, to tow the *Dorothy*. The contention was abandoned before your Lordships that the method of towage adopted was unusual or unseamanlike. But during the towage the unusual height of the breast wave, thrown up by the *Dorrington* and the *Dorothy* together, caused the water to reach the top-side seams of the *Dorothy*, invade the

H. L. (E.). 1921 MOUNTAIN v. WHITTLE. Lord Birkenhead L.C.

interior through the seams, and cause the *Dorothy* to sink shortly after her arrival off the gridiron at Messrs. Camper and Nicholson's yard.

It was contended on behalf of the appellant : first that there was no clear finding of fact that the cause of the casualty was the unusual height of the breast wave, or indeed that the breast wave was unusually high, and it was contended further that, if there were such findings, there was no evidence upon which they could properly be found. In my opinion these contentions fail. Commander Whittle speaks of the heavy wash of both vessels. Mr. Simey, who argued the case for the appellant extremely well, admitted, what indeed is obvious, that the larger the tug, the greater the resultant wave, and he could not dispute, having regard to the evidence, that the tug actually employed was of disproportionate size and power. The judgments below seem to me to embody the necessary conclusion of fact in reasonably clear language. Bailhache J. at p. 88 E of the Record, expresses himself as follows : "I am satisfied that what happened was that the breast wave, the bow wave from the *Dorrington*, raised the level of the water and caused the water to reach these leaky and defective seams. . . . . It must be borne in mind that there was a rather unusual danger about this particular operation by reason of the comparative size and power of the *Dorrington* as compared with this houseboat."

Bankes L.J. (1) used language even plainer : "It seems to me that the unusual height of the breast wave, caused by this large tug and the *Dorothy*, may properly be called a fortuitous accident or casualty of the sea."

It should be added to this short statement of the facts, that the *Dorothy* was found, and rightly found, to be unseaworthy on the ground that her seams above the water side were leaky and defective. But the policy was a time policy and therefore the unseaworthiness of the vessel of itself offered no defence to the claim. Nor was it contended that the defence under s. 39, sub-s. 5, of the Marine Insurance Act, 1906, was open

(1) [1920] 1 K. B. 447, 453.

to the appellant, as it could not be, and was not, shown that the respondent was aware of the vessel's unseaworthiness.

The questions which arise upon these facts, and upon those submissions of the parties which survive the argument, are the following: (1.) Was the loss caused by a peril insured against? (2.) Was the *Dorothy* covered by the policy during the shifting from her anchorage to Camper and Nicholson's yard for the purpose of docking and being put on the gridiron? (3.) Had the insured adventure been abandoned?

In order to answer these questions, it is necessary to consider the terms of the policy. This instrument was dated August 19, 1918, and was expressed to be for the space of six calendar months, commencing July 14, 1918, and ending January 13, 1919, for 400*l.* on hull and material, machinery and boilers of the vessel *Dorothy* "whilst anchored in a creek off Netley, however employed, with liberty to shift." The words just quoted are typed at the beginning of the printed form. Additional clauses are annexed to the instrument in print, while at its foot is stamped a short clause to the following effect: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." The perils insured against were perils usual in a Lloyd's policy, including perils of the seas.

I have made it plain that there are concurrent findings of fact in the Courts below to the effect that the unusual size of the breast wave either caused the entry of the sea water or effectively contributed to its entry. I see no reason for differing from these findings, and I adopt them as the basis of the conclusion which I have reached. In my opinion the nature of this wave constituted a "sea peril." The elements which are necessary to form a sea peril have frequently been collected and explained in this House. But it is no longer necessary, unless for purposes of illustration, to go further than the statutory provisions of the Marine Insurance Act; that the term "perils of the seas" refers only to fortuitous accidents or casualties of the seas, and does not include ordinary action of winds or waves. In my opinion the

H. L. (E.) 1921 MOUNTAIN v. WHITTLE. Lord Birkenhead L.C.

incidence and dimensions of the wave in question amounted to a fortuitous casualty of the seas and were not accounted for merely by the ordinary action of winds or waves. Upon the first point, therefore, I reach the conclusion that the loss was caused by a peril insured against.

It is in the next place contended that the *Dorothy* was only protected whilst anchored in a creek off Netley; that there was a deviation; and that she was unprotected at the moment of the casualty.

It is worth noticing that the parties apparently acquiesced in the view that the Hamble River, though not in fact a "creek off Netley," was to be treated as though it were. The appellant, however, disputed the reasonableness of founding upon this agreement a more extensive construction of the words "in a creek off Netley" than they would naturally bear. For the purposes of this opinion I draw no general inference from the tacit agreement to vary in this particular the scope of the original policy.

The respondent contended that two clauses of the policy extended its scope sufficiently for his purposes. In the first place he points out that he is given "liberty to shift." In the second place he relies upon the docking clause which I have already set out. Bailhache J. has found in his favour on the shifting facility, but against him on the docking clause. The Court of Appeal reversing this conclusion rejected his submission upon the first point, but decided in his favour upon the docking clause.

I agree with the view of the Court of Appeal. I think that the words "with liberty to shift" are to be construed as an extension of the scope of the policy which would otherwise only protect the vessel while it was actually anchored in the creek. In other words, if the freedom to shift had not been stipulated for the vessel would have been unprotected during the innumerable small movements which circumstances may from time to time have required. I do not think that the words were intended to cover a voyage of 7 or 8 miles to a different part of the coast.

But the docking clause must be determined in reference

to quite other considerations. In the first place it must be given a clear meaning. Counsel for the appellant attempted to attenuate its importance by pointing out that it was merely a stamped clause. I find myself quite unable in any case in which the circumstances are not altogether singular to treat some clauses of a contract as of primary and others as of secondary validity. The clause either is part of the contract or it is not. If it is, it must be construed in the same way as any other clause. It may sometimes be necessary in cases where the clauses of an instrument appear on the face of them to be contradictory to admit speculative appraisements of their comparative weight. But these ought always to be undertaken with hesitation and applied with extreme caution. In the present case we are to give a meaning to a clause which protects the insured vessel against all risk of docking, changing docks, and going on the gridiron. It is conceded that there is no dock and no gridiron in the Hamble River or in any creek off Netley. But it is nevertheless contended by the appellant that in spite of the plain language of the clause, protection ceased the moment the *Dorothy* left the Hamble River for Camper and Nicholson's yard at Northam, in other language, that the words "now anchored in a creek off Netley" so completely dominate the whole policy as to override the docking clause altogether. I cannot accept this contention. No reasonable meaning can be given to the docking clause, unless it is construed as extending the protection to the course of a voyage to a dock or gridiron such as a reasonable owner might, under all the circumstances of the case, be expected to employ and be justified in employing. I am not impressed by the arguments used in order to illustrate the supposed extravagant consequences of this construction. If an insurer extends the protection of the vessel insured to a voyage for the purpose of docking the vessel, he may be expected to acquaint himself with the measure of his liability by ascertaining where docks are reasonably to be found and how far "changing docks and going on gridiron" to which he has assented will increase his liability, and ought to be reflected in the rate to be charged. For these reasons

H. L. (E.) 1921 — MOUNTAIN v. WHITTLE. — Lord Birkenhead L.C.

I am of opinion that the second question must equally be answered in favour of the respondent.

The only remaining point may be very shortly dismissed. It is contended for the appellant that the insured adventure had been abandoned. This contention is founded upon the evidence of the respondent at p. 45 F of the Record. Commander Whittle there stated that it was his intention to spend the winter living on board the *Dorothy* at Northam, thereby (so it is claimed) abandoning altogether his anchorage in a "creek off Netley." It is sufficient upon this point to observe that it is not alleged that such an intention was ever communicated to the insurers; that it is not contended that the respondent did any act which made his intention irrevocable; and that it is extremely improbable that he would have reached, without any consideration whatever, a decision which might conceivably have deprived him of a protection which in certain contingencies he might still need and for which he was bound to pay.

I am of opinion that the appeal fails on every ground and that it ought to be dismissed. I move your Lordships accordingly.

I have to add that my noble and learned friend Lord Cave has read and concurs in the opinion to which your Lordships have just listened.

VISCOUNT HALDANE. My Lords, I have also had the advantage of previously seeing the proof of the opinion delivered by the Lord Chancellor. I concur in the conclusion at which my noble and learned friend has arrived and there is nothing that I desire to add.

VISCOUNT FINLAY. My Lords, the action in this case was brought upon a policy of marine insurance on the *Dorothy*, a houseboat, to recover for a partial loss by perils of the seas alleged to have been sustained during the currency of the policy.

The policy was expressed to be for six calender months, commencing July 14, 1918, and ending January 13, 1919,

"whilst anchored in a creek off Netley however employed with liberty to shift." It covered perils of the seas, and contained the following clause: "Including all risks of docking, undocking, changing docks and going on gridiron or graving docks, as may be required during the currency of this policy." The *Dorothy* had been lying in the Hamble River on Southampton Water. She belonged to the plaintiff, Commander Whittle, and had been used by him as a dwelling house for himself and his family, but for some months before September 21, 1918, had been occupied with his leave by the workmen employed in some urgent work on Southampton Water. He desired to resume occupation of the houseboat, and finding that she was not in a fit state for habitation by himself and his family he arranged that she should be towed up to Messrs. Camper and Nicholson's yard at Northam on the River Itchen to be thoroughly cleaned and repainted. A small tug, *The Test*, had been engaged for the towage, but owing to an accident *The Test* could not come, and a much bigger tug, the *Dorrington*, was sent instead. The Master of the *Dorrington* lashed the *Dorothy* alongside the tug. Bailhache J., before whom the case was tried, found that she was lashed alongside in the ordinary way with fenders to keep her off from the tug and fastened ahead and astern. On arriving at Northam, 8 miles off, it was found that a great deal of water had entered the *Dorothy* during the voyage. At Northam the *Dorothy* was cast off from the tug, and made further water until she sank.

The damages claimed were 400*l.* for partial loss in consequence of the sinking and 148*l.* 16*s.* 8*d.* under the Suing and Labouring clause. Bailhache J. gave judgment for 548*l.* 16*s.* 8*d.* accordingly, and the Court of Appeal dismissed an appeal from his judgment by the underwriters.

Three questions arise upon this appeal: I. Whether the *Dorothy* was covered by the policy at the time of the loss. II. Whether the policy had been abandoned. III. Whether the loss was by perils of the seas.

I. The underwriters contend on the present appeal that the insurance covered the *Dorothy* only while anchored in the

H. L. (E.) 1921

MOUNTAIN v. WHITTLE.

Viscount Finlay.

Hamble River and while shifting within the limits of the Hamble River, and that they are not liable, as the loss took place while she was proceeding up the Southampton Water on her way to the Itchen.

It is by no means easy to put a definite meaning upon the expression in the policy "whilst anchored in a creek off Netley." The underwriters assert that the Hamble River had been selected as the creek off Netley where the *Dorothy* was to lie at anchor, and that the shifting clause gave power to shift only within the limits of the Hamble River. The assured, on the other hand, contends that the insurance applied to the *Dorothy* while in any creek off Netley and that the shifting clause covered her while moving from one such creek to another.

The expression "a creek off Netley" taken by itself seems equally applicable or equally inapplicable to the Hamble River and to the Itchen. There was no evidence given of any special meaning attributed by usage to this expression. What is clear is that both sides regarded this expression as covering the Hamble River. Bailhache J. must have regarded it as covering also the Itchen. He decided that the *Dorothy* was covered by the shifting clause at the time of the loss. The liberty to shift must be to shift within the limits of the policy and could not cover the *Dorothy* unless she was shifting to a place which the policy would cover. Bailhache J. was of opinion that the *Dorothy* would not have been covered at the time of the loss by the "docking and undocking" clause.

The Court of Appeal did not agree with Bailhache J. that the shifting clause covered the *Dorothy* at the time of the loss, as they were not prepared to hold that shifting to the Itchen would be within the terms of the policy. It is not necessary for your Lordships to decide between the views taken on this point in the Court of Appeal and in the Court of First Instance respectively. In my opinion the Court of Appeal were clearly right in holding that, whether the shifting clause did or did not apply, the *Dorothy* was covered by what has been termed the docking and undocking clause.

It was argued for the underwriters that the liberty to dock, etc., must be confined to doing so within the limits of the Hamble River, and that the *Dorothy* could not go on gridiron or graving dock unless it was situate within these limits. As there are no such conveniences in the Hamble River this construction would prevent the clause from having any operation whatever in the case of the present policy. I cannot so construe its terms. In my opinion this clause applies whether the dock or gridiron was itself within or without the limits of the policy protecting the *Dorothy* while anchored, and it would also cover the vessel while proceeding to the dock or gridiron and while returning from it. If this view be correct it follows that the *Dorothy* was covered while she was proceeding up the Southampton Water to the gridiron at Northam, even if the policy would not have applied to the *Dorothy* if anchored in the Itchen. The conclusion arrived at by the Court of Appeal upon this clause seems to me to be right on the natural meaning of the words, and to be in conformity with the decision in *Pearson* v. *Commercial Union Assurance Co.* (1) It would very much restrict the operation of such a clause if the vessel could not go to any graving dock or gridiron beyond the limits covered by the policy for ordinary purposes. In the present case there was no place nearer or more suitable for taking the vessel to than Camper and Nicholson's Yard.

II. A second point was made by the defendants with reference to the voyage to the Itchen. It appears from the evidence that the practice of Commander Whittle had been that the *Dorothy* should be laid up during the winter in Camper and Nicholson's Yard, and that his family should live on board her there, and he said that it was his intention to do the same during the winter which was approaching at the time when this loss was sustained. He said that he meant to redecorate her and then live on board. The defendants contend that Camper and Nicholson's Yard at Northam was beyond the limits of the policy. On this point it is not necessary for your Lordships' House to express any opinion. Even

(1) 1 App. Cas. 498.

H. L. (E.) 1921 — MOUNTAIN v. WHITTLE. — Viscount Finlay.

if Camper and Nicholson's Yard were beyond the limits of the policy, so that keeping the vessel anchored there would have amounted to an abandonment of the policy, Commander Whittle, whatever he intended, had not communicated any such intention to the underwriters, and was absolutely at liberty to change his mind. He might, as soon as the decoration was completed, have taken the vessel back to the Hamble River if he were tempted to do so by specially fine weather. The mere fact that he had a certain intention in his own mind cannot amount to an election which would affect him as between himself and the underwriters.

I agree with both Courts below in thinking that this point entirely fails.

III. There remains for consideration the question whether the loss was by perils of the seas.

It appears that the *Dorothy* was not seaworthy owing to some opening of the top side seams. As the policy was a time policy there was no warranty of seaworthiness and there is nothing to show that Commander Whittle was aware of the unseaworthiness. It is, however, necessary for the assured to establish that the loss was due to a peril of the seas. If the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the seas—the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils of the seas. There must be some special circumstance such as heavy waves causing the entrance of the sea water to make it a peril of the seas. Was there such a peril here? Both Bailhache J. and the Court of Appeal find that there was, and upon the evidence I cannot doubt that they were right. It seems to be quite clear that the *Dorothy* was exposed to a wash of an extraordinary character from the great size and power of the *Dorrington*, the tug to which she was lashed. The breast wave so occasioned amounted to a peril of the seas just as much as if it had been occasioned by a high wind. No attempt was made on behalf of the underwriters to show that the water would have made

its way into the houseboat to the same extent if the wash and breast wave had been normal. The wash occasioned by passing vessels at sea may constitute a peril of the seas if of an extraordinary character, and if the wash here was occasioned by something abnormal in the strength and size of the tug or the mode of towage it was equally a peril of the sea. The fact that it was due to some negligence in the management of the vessel on the part of those to whom the owner had confided her does not prevent such an accident being covered by the policy.

Bailhache J. and the three judges in the Court of Appeal all agree in finding that there was an abnormally high breast wave caused by the size and strength of the tug to which the houseboat was lashed, and that this breast wave was responsible for the water reaching and entering through the defective seams. Apart altogether from the effect to be given to the concurrent findings of the two Courts it appears to me upon perusal of the evidence that these findings were manifestly right and that the appeal fails also upon this point.

I am therefore of opinion that the appeal should be dismissed with costs.

LORD SUMNER. My Lords, the subject matter of this time policy is the houseboat *Dorothy*, however, though not wherever, employed, for she is covered only "whilst anchored in a creek off Netley," with liberty to shift and with such other liberty as is involved in the docking clause.

"In a creek off Netley" limits the area within which the *Dorothy* is to be insured. What then is this area? The word is not "at" or "opposite"; and to speak of something being "off" a point on shore is very vague. The word "off" is not to be measured only by the distance straight off shore to the exclusion of the waters up or down the estuary. There is a further indefiniteness. Most creeks in the South of England have names; this creek is nameless. Moreover, is it the houseboat or the creek that is to be "off" Netley? I

H. L. (E.) 1921 MOUNTAIN v. WHITTLE. Lord Sumner.

can only say that I do not know when a creek, which is itself an indentation in or on a shore, can properly be said to be off that shore.

At the date of the policy the *Dorothy* was actually at anchor in the River Hamble. The underwriters forebore to argue at the trial that, if so, she was not "anchored in a creek off Netley." Not that there was any agreement between the parties that the River Hamble was such a creek, though I think it would probably have been so held, but the point was not taken. The underwriters may have thought that to such a contention a claim for rectification would be a successful answer, for, if not, the policy never attached. At any rate, the policy is now to be construed as it stands, and not as if it had been expressed "whilst anchored in the River Hamble."

When the *Dorothy* sustained the loss sued for she was off Messrs. Camper and Nicholson's yard on the River Itchen and was still in tow, that is, she was too far from Netley to be "off Netley" or "in a creek off Netley," and further, was not at anchor. Was she then exercising her liberty to shift? I think not. Whatever the area be within which she was laid up, it is within that area that she can shift, and not beyond it. Liberty to shift is not unlimited liberty to cruise or to anchor wherever the owner likes. The liberty must be confined to the limits of the lying up, to which the liberty to shift is ancillary.

What then is the effect of including "all risk of docking .... changing docks and going on gridiron as may be required" during the six months covered? As an addition to the perils insured against it may be that these words have no effect on the area within which those risks are to be incurred; but so read, the words are idle, for there are no docks, graving docks or gridirons in any creek off Netley. No one supposed that there were. However urgently docking might be required, the *Dorothy* on this construction would be at owner's risk on passing the indeterminate limit of her laid-up area, and her owner might have to choose, and quickly too, between sinking at anchor in a creek at underwriters' risk or towing to a

gridiron elsewhere at his own. This is not a practical view to take of the matter.

Further, risk of docking and undocking in any case includes some navigation outside the dock, the proximity involved being a question of fact. A fortiori is this true of "changing docks," and this involves a still wider area outside of any dock. If so much navigation outside of any dock is implied, because otherwise the clause would defeat its own object, I see no difficulty in implying that she was covered during the two or three miles at most by which she departed from her "creek off Netley." I do not understand it to be contested that she would have been covered while going from her anchorage to the gridiron, if there had been one within the area of the insurance, though that would have been implied from the docking clause, since the shifting would not be from anchorage to anchorage. Of course, this clause would not hold her covered while going to any dock, however far off or under whatever alteration of circumstances; but here the dock lay but a short distance beyond the limit, the passage was through similar waters, involving no different kind of risk from that of the passage within the specified area, and the ancillary character of this addition is strictly preserved. Even the point that in dry dock or on gridiron the craft is not waterborne is not enough to make the risk wholly dissimilar, for the houseboat, grounding at ebb-tide, might run the same risk of being wrung, as if unskilfully put on a gridiron or in dry dock. The clause is not a new and independent insurance, but is in support of the laid up or port risk. As she was not in a port at all, except perhaps in the administrative sense, if the clause did not entitle her to go to Messrs. Camper and Nicholson's yard, it meant nothing.

My Lords, the underwriters argue that it did mean nothing; yet it is part of the contract. It is not part of the old form of Lloyd's policy: it is purposely added, however humble the hand by which it is stamped on the policy, and however much it is a matter of course to do so with laid-up risks. There is no evidence of any usage; no suggestion of mistake; no counterclaim to rectify the policy by striking it out.

H. L. (E.) 1921 MOUNTAIN v. WHITTLE. Lord Sumner.

The fact that it is added to the form when the blanks are filled in and the form is made up for signature as a contract, shows that the words are words of contract, to which effect is to be given, if that can reasonably be done. Even if the docking clause were now part of the Lloyd's form, in this connection they would be part of this contract, for docking may be as needful to a laid-up vessel as to one making voyages. There are some expressions in this form of policy which have no application to this risk, such as the liberty to touch and stay. This results from expressing a laid-up risk for time on a voyage form. Similar results always follow from expressing insurances on ship alone on a Lloyd's form, which is also used for insurances on goods. Some words in the common form are always found to have no application to the insurance actually effected. Every one who is at all familiar with the way in which insurance policies are and long have been framed in practice and have always been interpreted in the Courts for a century and more before this policy, must know that an attempt to construe a ship risk by reference to words, which really belong to the goods form, is to disregard, and not to give effect to, the intention of the parties, but such is not the case here. The docking clause can have some meaning here, the only question is what that meaning is.

Two matters of fact alone remain—namely, (1.) was there evidence of a loss by perils insured against? and (2.) had the insured adventure been abandoned by the assured before loss? As to the first, the decision of Bailhache J. was affirmed by the Court of Appeal, and I should not myself presume to differ from the conclusions of four authorities so learned and so experienced in this subject as Bailhache J. and Bankes, Scrutton and Atkin L.JJ., and I think there was clearly evidence on which they could so find. In fact, my own conclusion would be the same, for the bow wave must have been indeed an exceptional one for 4 ft. of water in 100 minutes' towing at a moderate speed to have been forced through seams which were not open enough to have attracted attention, and sinking by such a wave seems to me a fortuitous casualty; whether formed by passing steamers or between tug and tow,

it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage.

I also think that the adventure was not abandoned in fact. What deviation would be as applied to this insurance I do not know, but, apart from the assured's being free to change his mind, I think he only meant that he did not intend to take the *Dorothy* back to the Hamble river, not that he did not intend that she should be anchored again "in a creek off Netley" at all during the residue of the term insured. The appellant's argument assumed that the policy was to be treated as if it had been expressed simply "whilst anchored in the Hamble river." I therefore agree that the appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 4, 1921.

Solicitors for the appellant: *William A. Crump & Son.*
Solicitors for the respondent: *Constant & Constant.*

[HOUSE OF LORDS.]

EVERETT (PAUPER) . . . . . APPELLANT;
AND
GRIFFITHS AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)* 1921 *March* 7.

Lunacy—Pauper—Summary Reception Order—Order by Chairman of Board of Guardians—Certificate by Medical Practitioner—Action for false Certification—Negligence—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 16, 28 —*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 25.

A justice of the peace or chairman of a Board of Guardians empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, if at the time of signing a reception order under s. 16 of the Lunacy Act, 1890, he is honestly satisfied that the alleged lunatic is a lunatic and a proper person to be detained, is not liable for negligence.

Per Lord Atkinson: A justice of the peace or duly authorized chairman of the Board of Guardians, in discharging his duties under s. 16, is

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD ATKINSON and LORD MOULTON.

H. L. (E.)
1921
EVERETT
v.
GRIFFITHS.

acting judicially, and on that ground is protected from an action for negligence.

The chairman of a board of guardians duly empowered to make orders for the reception of pauper lunatics signed an order, under s. 16 of the Lunacy Act, 1890, after inquiry and upon the certificate of a medical practitioner, for the reception of the plaintiff as a pauper lunatic in an asylum for lunatics. The plaintiff brought an action against the chairman and the medical practitioner for negligence in having respectively made the reception order and given the medical certificate. It was admitted that the defendants acted in good faith. At the trial before the Lord Chief Justice and a special jury the jury were unable to agree upon a verdict. The Lord Chief Justice entered judgment for the defendants on the law and a motion for a new trial was refused :—

Held, as regards the chairman, that, as at the time of making the reception order he was honestly satisfied as to the plaintiff's insanity, no action for negligence lay against him, and that he was entitled to judgment; as regards the medical practitioner, on the facts, that there was no evidence fit to be left to the jury of any want of care on his part, and that he too was entitled to judgment.

Per Viscount Haldane and Lord Atkinson : The chairman was entitled to judgment on the latter ground also.

Decision of the Court of Appeal [1920] 3 K. B. 163 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of the Lord Chief Justice at the trial of the action.

The respondent Griffiths was the chairman of the Board of Guardians of the parish of St. Mary, Islington, and was empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of persons as pauper lunatics in institutions for lunatics.

The respondent Anklesaria was the medical officer of the parish workhouse and was a medical practitioner within the meaning of the Lunacy Act, 1890.

The action was brought by the appellant for damages against the respondents for falsely and unlawfully certifying the appellant to be insane, thereby causing him to be unjustifiably incarcerated in Colney Hatch Lunatic Asylum. The appellant by his statement of claim alleged that the respondents certified him insane without good faith or reasonable care and acted contrary to and in excess of their legal jurisdiction, but the charge of mala fides was not insisted upon.

The order for the reception of the appellant into the asylum was signed by the respondent Griffiths upon the medical

(1) [1920] 3 K. B. 163.

certificate of the respondent Anklesaria, and was made under s. 16 of the Lunacy Act, 1890. (1)

The facts are stated in the report of the case in the Court of Appeal and sufficiently appear from the judgment of Viscount Haldane.

The action was tried before the Lord Chief Justice and a special jury. The jury were unable to agree upon a verdict and were discharged. The Lord Chief Justice ordered that judgment should be entered for both respondents upon the grounds that as regards the respondent Griffiths he was acting judicially in signing the reception order and the action would not lie against him; and that as regards the respondent Anklesaria the appellant's detention was caused not by the medical certificate but by the order signed by the respondent Griffiths.

Upon a motion for a new trial the Court of Appeal by a majority (Bankes and Scrutton L.JJ.; Atkin L.J. dissenting) affirmed the judgment of the Lord Chief Justice but on different grounds.

In the opinion of the majority the respondent Griffiths was to be deemed to be in the same position as a justice of the peace with regard to the signing of the reception order, and if he was honestly satisfied that the appellant was a lunatic and a proper person to be detained it was immaterial whether he exercised reasonable care in arriving at that conclusion. As regards the respondent Anklesaria, Bankes L.J.

(1) Lunacy Act, 1890, s. 16: "The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought under this Act shall call in a medical practitioner, and shall examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case that the alleged lunatic is a lunatic and a proper person to be detained, and, in the secondly-mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order, and the relieving officer, overseer, or constable who brought the lunatic before the justice, or in the case of a lunatic wandering at large, any constable who may by the justice be required so to do, shall forthwith convey the lunatic to such institution."

H. L. (E.) 1921 EVERETT v. GRIFFITHS.

was of opinion that there was no evidence that the said respondent failed to exercise reasonable care in arriving at the conclusion expressed by him in his certificate; Scrutton L.J. was of opinion that the said respondent was under no liability to the appellant to exercise reasonable care, and, further, that the giving of the certificate was not the cause of the appellant's detention.

Atkin L.J. was of opinion that there ought to be a new trial as regards both respondents.

Jan. 27, 28, 31; Feb. 1, 3, 4, 7, 8, 10.

The appellant in person. The question to be determined is, Is it material or immaterial for officials acting in the position of the respondents to exercise reasonable care in certifying a person to be of unsound mind and in making a reception order founded on that certificate, or may they be as careless as they like without incurring any liability.

As regards the respondent Griffiths it is said that he is immune from liability because he was acting judicially, but Magna Carta shows that no act can be considered a judicial act unless the accused party has had an opportunity of being heard, and this opportunity was denied to me. The reception orders under which I was detained purported to be made under s. 16 of the Lunacy Act, 1890, by the respondent Griffiths, who as chairman of the Board of Guardians was specially empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of pauper lunatics. There has been no compliance with the requirements of s. 16 by either of the respondents. Under that section care is necessary before a reception order can be signed in order to prevent injustice. The section provides that the justice (or chairman of the Board of Guardians) shall call in a medical practitioner and shall examine the alleged lunatic and make such inquiries as he thinks advisable, and if "upon such examination or other proof" he is "satisfied" that the alleged lunatic is a lunatic, and the medical officer has signed a certificate as to the state of mind of the alleged lunatic, he may make the reception order. The use of the word "satisfied" itself involves the exercise of reasonable care.

I say, and I have so sworn at the trial, that I was never examined within the meaning of this section, because I was afforded no opportunity of defending myself. The Legislature contemplated that the procedure should be the same as if I were being tried for a criminal offence. I was not interrogated as to the truth of the statements made by my mother and the police constable and I had no opportunity of calling evidence to prove my sanity. The respondent Griffiths accepted the statements contained in the case paper and the statements made about me by my mother without hearing me and without making any independent inquiry as to the veracity of those statements. Further, I have sworn that the respondent Griffiths by a question which he put to me, though he denies having put the question, misled me into believing that if I promised, as I did, not to give way to violence in the future I should be allowed to go free. There is here a direct conflict of evidence, which it is the province of the jury to decide, and in the face of my sworn statements it is impossible to say that there was no evidence to go to the jury of negligence on the part of the respondent Griffiths.

Then as to the respondent Anklesaria, the signing of the certificate was a condition precedent to the making of the reception order, and by s. 28 of the Act of 1890, which is a provision inserted for the protection of the alleged lunatic, "every medical certificate upon which a reception order is founded" must state the facts upon which the medical officer has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others; and a reception order shall not be made upon a certificate founded only upon communicated facts. Now the only facts stated in the certificate as having been observed by the respondent Anklesaria himself as indicating insanity are that I did not work because I thought my father was rich enough to support me and that I thought my lungs were not well developed. In this certificate there are no primary facts upon which any reasonable man could find me a lunatic. There is therefore ample evidence of

H. L. (E.) 1921 EVERETT v. GRIFFITHS.

want of reasonable care, which in the case of a professional man involves reasonable skill in his profession, on the part of the respondent Anklesaria. *Thompson* v. *Schmidt* (1) was a decision as to the liability of a relieving officer under s. 20 and has no bearing on this case. The effect of ss. 16 and 28, when read together, is to make it clear that both respondents are jointly liable as joint administrators.

Further, s. 330 implies that officials in the performance of their duties under this Act, even when acting within their jurisdiction, will be held liable unless they act in good faith and with reasonable care, and Atkin L.J. has so held. In *Harward* v. *Hackney Union* (2), which was also a decision under s. 20, Chitty L.J. took the contrary view of s. 330 and held that the requirement of good faith and reasonable care could not be imported from s. 330 into s. 20. I say first that that decision is wrong in law and secondly that it does not apply to s. 16.

Reg. v. *Pinder* (3) shows that in making a reception order no facts can be taken into account except those appearing on the medical certificate; it is therefore essential that the certificate shall contain all the particulars prescribed by the statute. That was a decision upon the corresponding section (s. 4) of the Act of 1853 (16 & 17 Vict. c. 96). To prove insanity mere eccentricity or violence of temper is not enough, there must be actual delusions: *Waring* v. *Waring* (4); and see Halsbury's Laws of England, vol. xix., § 836. A medical man who signs a certificate without making proper inquiries is liable for negligence, even though he acts bona fide: *Hall* v. *Semple*. (5) In a case of this kind where the question is as to the weight of evidence the Court is extremely reluctant to interfere with the province of the jury: *Eliot* v. *Allen*. (6) [He also referred to *Weldon* v. *De Bathe* (7); *Weldon* v. *Semple* (8); and *Weldon* v. *Winslow*. (9)]

An inquiry such as that prescribed by s. 16, which affects

(1) (1891) 56 J. P. 212.
(2) (1898) 14 Times L. R. 306.
(3) (1855) 24 L. J. (Q. B.) 148, 151.
(4) (1848) 6 Moo. P. C. 341, 353.
(5) (1862) 3 F. & F. 337.
(6) (1845) 1 C. B. 18, 40.
(7) (1884) 14 Q. B. D. 339.
(8) The Times of July 29, 1884.
(9) (1884) 13 Q. B. D. 784.

the civil rights of individuals, must be conducted on principles of natural justice and an opportunity must be given to the party occupying the position of defendant to state his case: *Capel* v. *Child* (1); *Smith* v. *The Queen* (2); *Wood* v. *Woad.* (3)

[VISCOUNT HALDANE. When you have concluded your argument on the question whether on the facts there is any evidence of negligence, their Lordships would like to hear you as to the law solely on the point whether there was any obligation upon the chairman of the Board of Guardians except to be honest.]

It is impossible to comply with the requirements of s. 16 without exercising reasonable care. *Reg.* v. *Whitfield* (4) is distinguishable because there the only question was as to the validity of the reception order. Here the question is whether the order was made with reasonable care, and, if not, whether there was a breach of duty owed to me. Further, it is open to review by this House. In that case Lord Coleridge C.J. dissented. I rely particularly on that part of his judgment in which he shows the necessity for care in the examination, having regard to the frightful consequences to an alleged lunatic of a mistaken inference from the examination. If the respondent Griffiths has not fulfilled the statutory obligations imposed on him he is negligent and is liable to an action at common law: *Ashby* v. *White* (5); *Ferguson* v. *Earl of Kinnoull* (6); and see *Doswell* v. *Impey.* (7) Griffiths, when acting under this s. 16, was an administrator, not a judicial officer. The chairman of a Board of Guardians is an elective officer and cannot administer an oath and is therefore not entitled to the immunity granted to judicial officers when acting in the discharge of their judicial duties. He was not in the same position as a justice under s. 16; but, assuming that he was, a justice

(1) (1832) 2 Cr. & J. 558, 577.
(2) (1878) 3 App. Cas. 614.
(3) (1874) L. R. 9 Ex. 190, 196.
(4) (1885) 15 Q. B. D. 122, 134, 136–7.
(5) (1703) 2 Ld. Raym. 938; 3 Ibid. 320; 1 Sm. L. C., 12th ed., 266.
(6) (1842) 9 Cl. & F. 251, 279, 289, 292, 303.
(7) (1823) 1 B. & C. 163, 174–5.

H. L. (E.) 1921 EVERETT v. GRIFFITHS.

himself, when acting under this section, is an administrative officer.

[Upon this point reference was made to *Leeson* v. *General Medical Council* (1); *Fraser* v. *Balfour* (2); *Scott* v. *Scott* (3); *Sharp* v. *Wakefield* (4); *Wickes* v. *Clutterbuck*. (5)]

In *Fletcher* v. *Fletcher* (6) Lord Campbell stated the common law of England to be that "no person can be imprisoned as a lunatic unless he is actually insane at the time"; and see *Brookshaw* v. *Hopkins*. (7) Both by statute and at common law a duty is cast on both the respondents to exercise reasonable care and they are both jointly liable for the breach of this duty.

[On the question what constitutes negligence the appellant referred to *Cooke* v. *Midland Great Western Ry. of Ireland* (8); *Dominion Natural Gas Co.* v. *Collins* (9); *British Columbia Electric Ry. Co.* v. *Loach*. (10)]

Rawlinson K.C. and *Sydney Davey* for the respondents.

[VISCOUNT HALDANE. We wish to hear you as to the position of the respondent Griffiths.]

On any standard of liability there is no evidence of any breach of duty on the part of either of the respondents. The respondent Griffiths at the time of making the reception order was honestly satisfied that the appellant was a lunatic and he is under no obligation to exercise reasonable care in arriving at his decision. The inquiry under s. 16 of the Act of 1890 is a judicial inquiry: *Hodson* v. *Pare*. (11) That was a decision under s. 6 of the Act, but if there is any difference for this purpose between the two sections s. 16 is more favourable to the respondents' contention on this point. That being so, the respondent Griffiths, acting within his jurisdiction, is immune from any action in respect of anything done on that inquiry: *Bottomley* v. *Brougham* (12); *Burr* v. *Smith* (13);

(1) (1889) 43 Ch. D. 366.
(2) (1918) 34 Times L. R. 502.
(3) [1913] A. C. 417.
(4) [1891] A. C. 173.
(5) (1825) 2 Bing. 483.
(6) (1859) 1 E. & E. 420, 423.
(7) (1773) Lofft, 235, 243, 244.
(8) [1909] A. C. 229.
(9) [1909] A. C. 640.
(10) [1916] 1 A. C. 719.
(11) [1899] 1 Q. B. 455.
(12) [1908] 1 K. B. 584.
(13) [1909] 2 K. B. 306.

Anderson v. *Gorrie* (1); *Munster* v. *Lamb* (2); *Law* v. *Llewellyn* (3); *Dawkins* v. *Lord Rokeby* (4); *Barratt* v. *Kearns* (5); *Scott* v. *Stansfield.* (6) By virtue of s. 25 of the Lunacy Act, 1891, the respondent Griffiths is entitled to the same protection against actions as a justice of the peace. He therefore comes within s. 1 of the Justices Protection Act, 1848, whereby no action will lie except for an act done maliciously and without reasonable and probable cause, and admittedly this respondent acted bona fide: *Barton* v. *Bricknell* (7); *Ratt* v. *Parkinson* (8); *Bott* v. *Ackroyd* (9); *Pease* v. *Chaytor.* (10) Even if he is not within s. 1 he is protected by s. 4. Further, apart from the Justices Protection Act, 1848, "justices of the peace are not punishable civilly for acts done by them in their judicial capacities. . . . . But in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king": Hawkins's Pleas of the Crown, 8th ed., vol. ii., p. 57. To make a justice amenable to an action at common law in respect of the discharge of his duties there must be either malice or a corrupt motive: *Bassett* v. *Godschall* (11); *Mills* v. *Collett* (12); *Cave* v. *Mountain* (13); *Linford* v. *Fitzroy.* (14)

[VISCOUNT HALDANE referred to *Local Government Board* v. *Arlidge.* (15)]

The Justices Protection Act, 1848, as shown by the cases above cited upon the construction of the Act, took away no existing protection but added a protection in the case of irregularities which did not amount to an excess of jurisdiction. Even if the respondent is not a magistrate, as a statutory official exercising a discretionary power he is not liable for

(1) [1895] 1 Q. B. 668, 671.
(2) (1883) 11 Q. B. D. 588.
(3) [1906] 1 K. B. 487.
(4) (1873) L. R. 8 Q. B. 255; (1875) L. R. 7 H. L. 744.
(5) [1905] 1 K. B. 504, 511.
(6) (1868) L. R. 3 Ex. 220.
(7) (1850) 13 Q. B. 393.
(8) (1851) 20 L. J. (M. C.) 208.
(9) (1859) 28 L. J. (M. C.) 207.
(10) (1861) 1 B. & S. 658.
(11) (1770) 3 Wils. 121.
(12) (1829) 7 L. J. (O. S.) (M. C.) 97, 101.
(13) (1840) 9 L. J. (N. S.) (M. C.) 90.
(14) (1849) 13 Q. B. 240.
(15) [1915] A. C. 120.

H. L. (E.) 1921 EVERETT v. GRIFFITHS.

the erroneous exercise of his discretion in the absence of malice: *Tozer* v. *Child* (1); *Partridge* v. *General Medical Council.* (2)

The appellant in reply as to the legal position of the respondent Griffiths cited *Gelen* v. *Hall* (3), *Kirby* v. *Simpson* (4), *Lane* v. *Santeloe* (5), *Taaffe* v. *Downes.* (6)

The House took time for consideration.

1921. March 7. VISCOUNT HALDANE. My Lords, the question which arises in this appeal is one of great importance from the points of view of both of the parties to it, and I have endeavoured to examine it as being such. The action out of which the appeal arises was brought by the appellant against the respondents for damages for a false and unlawful certification by them of himself as being of unsound mind, resulting in his incarceration at Colney Hatch Lunatic Asylum. It is therefore an action for damages for false imprisonment, based on alleged breach of duty. The real legal question is not whether the appellant was actually of unsound mind when he was so certified, but whether the respondents committed a breach of any obligation to be careful in so certifying.

My Lords, the appellant is a young man who at the date of the occurrences in question was twenty-three years of age. He has conducted his case in person both here and in the Courts below, and he is obviously a person of much acuteness and a good deal of knowledge and ability. That he should possess these qualities is of course logically consistent with his having been incapable of self-control at the date of the occurrences which gave rise to his being certified, and it must be borne in mind that incapacity to exercise the self-restraint which is incumbent on the members of a civilized society is a condition of mind the mischievous consequences of which have to be estimated with reference, not only to the individual member of society himself, but to the right of his neighbours

(1) (1857) 7 E. & B. 377.
(2) (1890) 25 Q. B. D. 90.
(3) (1857) 2 H. & N. 379.
(4) (1854) 10 Ex. 358.
(5) (1718) 1 Stra. 79.
(6) (1813) 3 Moo. P. C. 36*n*.

to live their lives free from reasonable apprehension of violent conduct towards them.

On Friday, March 21, 1919, the mother of the appellant, who was residing with his parents at 59, Southgate Road, in the parish of Islington, called in the police, and asked that her son should be put under restraint, as he was of unsound mind and dangerous. The police took him to the Islington Workhouse, under the authority of the provisions of s. 20 of the Lunacy Act, 1890. He was received into the workhouse and detained there. On March 21, 22 and 23 he was examined by the respondent Anklesaria, the medical officer of the workhouse, who visited and watched him. On the morning of Monday, the 24th, there was held at the workhouse a special inquiry into the condition of the appellant by the respondent Griffiths, who was chairman of the Board of Guardians of the parish and had been empowered by the Lord Chancellor, under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of pauper lunatics into institutions for lunatics.

I shall refer later on to what took place at this inquiry and to the circumstances in which the reception order complained of was made. It will be convenient first of all to turn to the sections of the Lunacy Acts which are relied on as having conferred jurisdiction.

My Lords, the object of the Lunacy Act of 1890 was to secure as far as possible that persons put under restraint as being of unsound mind should not have their liberty so interfered with unless stringent conditions were complied with. For this purpose these persons were classified, and conditions were enacted requiring a reception order to be made in a form appropriate for each class. For one class the proceedings were contemplated as being initiated by application from a relative or friend. In the case of another class the police might take action. But the general principle was that the decisive reception order could only be made by some one of independent and judicial authority. By s. 13, where a constable, relieving officer, or overseer of a parish came to know that any person not being a pauper or wandering at large

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

was a lunatic and not under proper care, or was cruelly treated, or neglected, he was to give information to a justice being a judicial authority under the Act, and the justice could send medical practitioners to visit and examine the alleged lunatic and could order his reception into an asylum, subject to certain safeguards. By s. 14 the procedure was extended with certain modifications to paupers deemed to be lunatics, and in this case, by s. 16, the justice was to call in a medical practitioner and could, if the prescribed conditions were satisfied and the proper inquiries had been made, make a reception order, if under the circumstances he was "satisfied," on examination or other proof, that the alleged lunatic was a lunatic and a proper person to be detained. In such instances the medical practitioner was to sign a certificate. Sect. 28 states certain conditions. Any medical certificate is to be signed by a medical practitioner, who is defined to be one registered under the Medical Acts. By the same section the medical certificate, which may be in the form 8 prescribed in the second schedule to the Act, is to state the facts on which the practitioner has formed his opinion, distinguishing facts observed by himself from facts observed by others, and containing a statement that it is expedient for the welfare of the alleged lunatic or for the public safety that he should be placed under care and treatment, with the reasons for such statement. The certificate is to be evidence of the facts appearing in it and of the judgment formed by the practitioner, as if verified on oath. By s. 29 the reception order is not to be made unless the examination by the medical practitioner has taken place within seven days of the dates of the reception order. The reception order, under another provision of the Act, is to expire at the end of a year. The Act contained provisions for reports to be made to the Lunacy Commissioners on the condition of patients in the asylums to which they had been sent, for the treatment of such patients, for visits of inspection by the Commissioners, and for the transmission of complaints and communications by the patients. There are many further provisions in the Act for the inspection and regulation of asylums and for

visiting the patients, but none of these are material for the present purpose. The only other section which has to be referred to is s. 330, which enacts that any person who signs or carries out, or does any act with a view to sign or carry out, an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under the Act, or to do anything in pursuance of the Act, shall not be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction, or on any other ground if such person has acted in good faith and with reasonable care.

In 1891 a further Lunacy Act was passed, s. 25 of which enacted that if, for the due administration of the Lunacy Acts, 1890 and 1891, in any union, the Lord Chancellor thinks it desirable, he may, by writing under his hand, empower the chairman of the Board of Guardians to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, and every order so signed shall have effect as if made by a justice of the peace under the principal Act. Under this section the respondent Griffiths was duly appointed to sign reception orders by the Lord Chancellor.

Since these Acts were passed, the powers of the Lunacy Commissioners have been transferred to the Board of Control established by the Mental Deficiency Act, 1913, but nothing in the latter Act affects the questions arising in this appeal.

I now turn to the facts in the case before us.

My Lords, the appellant was on March 21, 1919, in the house with his parents at the address in Islington I have already mentioned. His father was a pharmaceutical chemist, apparently in no large way of business. On that day his mother called in a policeman (Police-constable Crookes), asking him to come and restrain the appellant, on the ground that he was dangerous and of unsound mind, and that she and his father were both afraid of him. It appears that he had been violent, had pulled a curtain down, and in a struggle with his father had bitten the latter on the hand, and had struck his mother. The acts of violence do not appear to have had any serious consequences, but they may have been alarming. In other matters his disposition was

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

unusual. He refused to do anything to earn his living, alleging that his father was rich enough to support him, he lay in bed till the middle of the day, worried people with accusations of selling food contrary to the regulations then in force, and occupied himself energetically with public questions such as women's suffrage and that of peace. These were in themselves things which a perfectly sane person might have done, but they are not irrelevant in considering temperament in a context.

My Lords, we have had a full opportunity of observing the appellant at the Bar of this House. He has conducted his case in some respects with unusual ability, and he is within his rights in holding and proclaiming the views he maintains on public questions. Against him there is nothing to be said in these respects. I will go further and add that I think that he is an idealist in some ways on a higher level than most of his fellow-men. He is now freed from the reproach of being of unsound mind. Still, he is obviously of an excitable disposition, and it is at least possible that on the date in question he may have got into such a condition as to be of unsound mind in the sense that he was unable to control himself by reason of a temporary disturbance of mental balance.

But that is not the question which we have to determine. The real question is a different one, whether people whose business it was to form a judgment about it could reasonably come to the conclusion that he was in that state, and that it was desirable, in the interests of his neighbours, who were entitled to live unmolested, that at the time he should be placed, temporarily, at all events, under restraint and treatment.

The police-constable thought him strange in manner, and called in Police-inspector Owen. Both officers, having seen and conversed with him, thought the appellant of unsound mind, and they removed him to the workhouse for the parish, where he was detained. He was examined there by the medical officer, the respondent Anklesaria, who visited and watched him on Friday, March 21, and on the Saturday and

Sunday following. He was also observed and attended by George Judge, the mental attendant at the workhouse, and by Emma Gardiner, the superintendent nurse. His case was considered by the medical officer, who says that he was excited, sometimes laughing and sometimes crying, and had exaggerated ideas of his own importance. He asserted that his father was rich, which the parents declared to be far from the fact. He was a vegetarian, and would not eat animal food or drink milk. His clothes were disorderly, and his condition dirty. The medical attendant, as the result of continual observation, came to the conclusion that he was of unsound mind, and ought to be detained, and that it would not have been safe to send him back to the house of his parents, who were not in a position to pay for a special attendant. The mental attendant at the workhouse hospital and the superintendent nurse appear, as the result of a good deal of observation, to have come to the same conclusion. Later, on the Thursday, after the reception order had been made, but he was still in the workhouse, an incident occurred which is not without its relevancy to the evidence bearing on the earlier occurrences, and to the appellant's condition throughout these days. He was walking about the hospital ward while the doctor and the nurse were out of it. They heard a scream, and on entering the ward found that the appellant had torn up the reception order and the papers with it, and was crying and much agitated.

On Monday, March 24, the respondent Griffiths attended at the workhouse to hold an inquiry into the condition of the appellant. There were present from the commencement of this inquiry the respondent Anklesaria and the general relieving officer, Clegg. Police-constable Crookes and the appellant's mother were called in, and gave their evidence on oath. The appellant was subsequently brought in, and was examined by the respondent Griffiths. A case paper was produced, which contained particulars of a previous occasion when the appellant had been brought to the workhouse under analogous circumstances, in which he had been breaking glass and had refused to eat or drink, but had been

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

discharged by Mr. Lambert, the justice of the peace then acting, on the understanding that he would be under his mother's protection. It was also before the respondent Griffiths on the occasion of the inquiry complained of that the appellant's father had been afflicted in a way similar to his son when of the age of twenty-nine, and that the grandfather had committed suicide. According to the respondent Griffiths the mother told him at the inquiry on March 24 that her son had been acting violently for some time, and that both she and her husband had become afraid of him. She appears to have added that he was very dirty. The practice at such inquiries appears to be that the witnesses make their statements to the magistrate separately, retiring after giving their evidence. After these witnesses had been examined the appellant was brought in and questioned. Griffiths says that he began by wishing him "good morning" and saying that he (Griffiths) was there to help him, and that the appellant should not distress himself. He then told him what his mother and the policeman said, and asked him whether he had anything to say. The procedure usual in such inquiries as held on previous occasions was followed. Griffiths did not ask him whether he wanted to call a doctor, nor did the appellant suggest doing so. The appellant says that he did not explain himself properly to the magistrate, because he had not the slightest idea that he could be certified as insane without being brought into a public court. He says that the magistrate asked him if he would promise not to lose his temper with his people again, and that he readily gave this promise, and added that he desired to obtain employment which would enable him to become independent. The appellant says that he assumed, having given the promise, that he would be allowed to go free. Griffiths denies having asked any such question. I assume, however, for the purpose of the question in this appeal, that he did ask it. If he did, it is at least possible that he may have done so for the purpose of seeing what sort of reply would be given. I do not think that the point is an important one. I should mention that the mother was in Court at the trial, and that

the jury, on being asked, said that they did not desire to have her in the box. Neither the respondents nor the appellant expressed a wish that she should enter it.

At the close of the inquiry the respondent Griffiths consulted the respondent Anklesaria, the medical officer, and came to the conclusion that it was a case for detention. After the medical attendant had made his certificate, Griffiths made an order dated March 25, directing the superintendent of the Colney Hatch Asylum to receive the appellant as a patient. The reason stated in the order was that the appellant was a lunatic, and a proper person to be taken charge of and detained. To the order there was subjoined a statement of particulars, containing among other details, a statement that this was not the first attack ; that the duration of the present attack had been about three years, getting worse, that the cause supposed was over-study ; that the appellant was dangerous to others, in that he had attacked his father and mother ; that the father had been twenty years ago in confinement, and that his grandfather had committed suicide. This statement was signed by Clegg, the relieving officer. The respondent Anklesaria had previously made a certificate dated on the previous day. It was in the form prescribed by the Lunacy Act, 1890. It stated his qualification as a medical practitioner, and that having personally examined the appellant he had come to the conclusion that he was a person of unsound mind, and proper to be taken charge of and detained under care and treatment. In conformity with the statute the grounds on which this conclusion was based were stated, and divided into those facts observed by himself and those communicated by others. As to the facts directly observed, they were that the appellant did not want to work, as his father was, in his view, rich enough to support him, and his mistaken allegation that his lungs were not well developed. As to the facts communicated, those specified were among others, that the appellant would not do any work, but lay in bed till the middle of the day ; worried his mother with questions for hours at a time ; struck her without provocation ; worried people selling food by

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

accusing them of breaking the law, which they had not done; striking his father and adopting a threatening attitude so that the police had to be called in. There was included also the statement of the police-constable that the appellant was strange in manner, and had pulled down the curtains in his father's house, and that he had seen him in a violent attitude.

It must be remembered that these facts did not stand by themselves, for the respondent Anklesaria had also observed the appellant for three days, and the respondent Griffiths had inquired not only of him but of the mother and the relieving officer and the attendant Brown, besides having before him a case paper containing the appellant's record. Griffiths had had a good deal of previous experience in such inquiries.

On March 27 the appellant was removed to the Colney Hatch Asylum, and was received there. He was examined by Dr. Gilfillan, the medical superintendent, and by Dr. Conolly, one of the medical officers. They arrived at the same conclusion as the respondent Anklesaria, and the case was reported to the Board of Control. On April 9 the appellant escaped from the asylum, and, having evaded capture for fourteen days, became under the statute no longer liable to be retaken under the existing order.

On June 4 he issued a writ against the two respondents for damages for false and unlawful certification, causing him to be unjustifiably taken to and incarcerated in an asylum although of sound mind. The action was tried before the Lord Chief Justice and a special jury, and witnesses were called on both sides. At the close of the evidence the Lord Chief Justice thought it desirable to endeavour to avoid in any event the necessity for a new trial, by submitting the facts to the jury for their opinion as to whether the respondents exercised reasonable care. On this question the jury were unable to agree. The Lord Chief Justice then gave judgment for the respondents on a point of law. He held that the respondent Griffiths was in the position of a justice of the peace doing a judicial act, and could not be sued as

respecting it. As regards the respondent Anklesaria he held that the certificate, which had been given in good faith, was not the direct cause of the order. He was consulted in an advisory capacity, and it was the order of the justice which was the cause of the detention. He therefore entered judgment for the respondents.

The appellant applied to the Court of Appeal to set aside this judgment and for a new trial. The case was fully argued and judgment was reserved. The judgments ultimately delivered were elaborated with much care and are very instructive. Bankes and Scrutton L.JJ. concurred in thinking that the appeal ought to be dismissed; Atkin L.J. considered that there ought to be a new trial.

Bankes L.J., in a reasoned opinion, dealt with the case of the respondent Griffiths on the footing that s. 330 of the Act of 1890, which provides that a person who signs a reception order shall not be liable if he has acted in good faith and with reasonable care, does not deprive him of any protection he may have apart from the section. He pointed out that the appellant made no imputation against either respondent of want of good faith. The case of the appellant had in the first instance been treated as an urgent one under s. 20, and he had been removed to the workhouse. The relieving officer had then given notice to Griffiths as having jurisdiction. The latter had then proceeded in accordance with s. 16 by calling in a medical practitioner, examining the lunatic, making the inquiries he thought necessary, and then, on the signature by the medical attendant of a certificate, directing the alleged lunatic to be received and detained. The learned Lord Justice construed s. 25 of the Act of 1891 as giving Griffiths, as chairman of the Board of Guardians, the same immunity as if he had been a justice of the peace acting under the statute of 1890. He thought, as the result, that it was unnecessary for him to decide the point taken by the Lord Chief Justice that Griffiths was acting in a judicial capacity, and was, on that ground alone, protected. For even if he was acting in an administrative capacity he was honestly "satisfied" within the meaning of s. 16, an

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

expression which was the same as that used in s. 20, and was justified in making the order. It was not material, having regard to the language of the statute, whether he had used reasonable care in arriving at the decision. In the case of the respondent Anklesaria he was of opinion that, by undertaking the examination, he came under a duty, but that the limits and extent of the duty must be ascertained by reference to the language used by the Legislature in the Act. He was bound to act in good faith, and, he thought, also with reasonable care. As to reasonable skill being required he expressed no opinion on the point as being one not raised. If he acted in good faith and with all the care he could command that was enough. For apart from the fact that the appellant had not made any case against the medical officer of want of skill as distinguished from want of care, the Legislature had not required more than that he should be in actual practice, and should give his opinion with its grounds in order that the person to whom it was given might accept or reject it. He thought that, as the outcome of the evidence, there was therefore no case to go to a jury as against Anklesaria.

Scrutton L.J. reached a conclusion similar to that of Bankes L.J., but in some respects on different grounds. He thought that there was no evidence to go to a jury that Griffiths was not satisfied, and that it was unnecessary to enter on the question whether he was entitled to the full protection which the common law and the Justices Protection Act threw round judges. As to Anklesaria he was of opinion that his only obligation was to be satisfied honestly, and that it was really conceded that this obligation had been satisfied. There was no legal relation between him and the appellant, and the question whether he had used reasonable care and skill was therefore irrelevant. He concluded his judgment by pointing out that restraint on liberty under the Lunacy Act may be imposed, not merely for the sake of the person affected, but in the interests of the community which has to be protected, and that to ensure this a liberal immunity for those who certify honestly was required. The statute

was accordingly based on the theory that justices and medical men had to be trusted, and, in order to secure this end, they must be protected.

Atkin L.J. dissented. The serious issue, he thought, was whether a sane man who without reasonable care is imprisoned in an asylum is by law without redress against those whose negligence has caused him so serious an injury. He said that in the case of proceedings initiated by petition the procedure was that characteristic of a true judicial inquiry. For there was in that case a judicial authority expressly so called, a petition, a hearing, an opportunity for the alleged lunatic to be heard, and a provision that the grounds of the decision must be stated. I make the observation on this that reception orders to be made on petition have been distinguished by the Legislature from orders to be made in the case of paupers and also from those where there has been an inquisition. The procedure on a private petition is a substitute for that by inquisition and is therefore similarly of a judicial nature. As distinguished from that in the case of paupers it has not the administrative features which have apparently been considered to be required in the latter instance for the security of his neighbours as well as of the lunatic himself. This appears, from consideration of the structure of the statute, to have been the view of Parliament, which has put the safeguards in such cases into the form of regulation of the asylums, supervision by the Lunacy Commissioners, now by the Board of Control, and the temporary character of the orders made for restraint. With these observations I return to the judgment of the learned Lord Justice. He went on to say that in the cases of paupers the reception orders are in the nature of administrative acts rather than of judicial proceedings. He quoted Lord Lindley as having remarked of analogous proceedings under the Lunacy Act of 1853, that the reason why it had been deemed inappropriate to give the lunatic "ex debito justitiæ" an opportunity of explaining his conduct and the appearances against him was that a judicial inquiry properly so called was not intended, inasmuch as the justices had to act in cases of emergency and danger, and that these

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

measures were in truth precautionary only and such as could be soon corrected if wrong. The very requirement of good faith in a constable or relieving officer professing to be satisfied that the case was one for removal to the workhouse negatived the judicial character of the procedure and any judicial immunity in such an instance, and indicated that summary orders, whether made by a justice, a commissioner, a constable or a relative were administrative. The rule of public policy that a judge must be absolutely protected against all proceedings applied at most to justices of the peace acting judicially, and not when they were acting administratively by making summary orders. Having arrived at this conclusion the learned Lord Justice held that the statute read as a whole implied that in the discharge of the administrative duties in question each of the two respondents was bound to act in good faith and to exercise reasonable care, for even in the case of the medical attendant the certificate would be a step in bringing about detention. A mere error in judgment would not bring about liability, but a negligent inquiry might do so, and the duty extended to the exercise of reasonable skill. In the cases of both respondents the learned Lord Justice thought that there was evidence to go to the jury of want of reasonable care. He was impressed with the ability and demeanour displayed by the appellant in conducting his own case at the trial and before the Court of Appeal, and also by the evidence of the medical and other witnesses whom he called. Atkin L.J. thought that if the respondents had been careful they would have made further inquiries themselves, or would alternatively have given the appellant an opportunity of putting before them evidence which he had available. There should therefore, having regard to what was at the least a conflict of evidence, have been a new trial.

My Lords, I have analysed thus fully the judgment of Atkin L.J., not only because it is a powerful piece of reasoning, but because of the anxiety it displays to guard against a possible miscarriage of justice. It is necessary in the public interest that the King's Judges should exercise special care

in their supervision of the administration of the law affecting the freedom of unfortunate persons who may have neither the means nor the capacity to defend themselves. But I observe that the learned Lord Justice has placed emphasis on two matters to which he attaches an apparently dominating importance. The first is the evidence given at the trial by the appellant's witnesses. The second is that he was deprived of liberty and confined as a lunatic. Now these are phases in the case which are of course of great moment, but they have to be considered in their proper perspective. In considering the evidence given by the witnesses it is necessary to have in mind the nature of the issue to which alone it was relevant. In the Lunacy Act of 1890 Parliament has provided differently for different classes of case. If a person is perfectly quiet in behaviour but has property which has to be guarded, the Legislature may well take the view, as it appears by the statute to have done, that the main question being one as to whether he should be free to deal with his property, all that is needed is a trial conducted on judicial principles. But where the question is one of immediate danger to society from violent conduct, the dominant consideration may be the taking of the immediate steps required to avert risk, and the provision of security for treatment and for a speedy review of a decision which may have had to be made hurriedly. I think it is unfortunate as tending to create misapprehension that in providing for the very different cases for which provision has been made under the Lunacy Acts, only one designation, that of lunacy, has been applied to them indifferently. By the definition section "lunatic" includes any person of unsound mind. By Form 8 of Sch. 2, the medical practitioner need not certify more than that the patient is a person of unsound mind and a proper person to be taken charge of and detained under care and treatment. That is all that may be imported by "lunatic." It may cover the case of a person who has only temporarily lost control of his mind owing to physical or other reasons which may pass away. Not the less the immediate safety of society may require his detention. To

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

provide for such cases has apparently been the purpose of Parliament as expressed in the Act of 1890. Now there may be persons of a high degree in other respects of mental quality who have rendered proper the temporary intervention of the public authorities to whom the preservation of law and order has been entrusted. The want of self-control may arise from an unsoundness of mind which manifests itself only in one direction and may pass away rapidly. A highly nervous and excitable temperament may give rise to such unsoundness. In the instances of those who have affluent members of their families surrounding them and able to provide skilled assistance, it may be quite safe to leave the patient in charge of his relatives. In the case of the poor to do so may be disadvantageous to both, as well as to the public interest. So Parliament seems to have thought, and the circumstance takes away something at least of the sting of being pronounced of unsound mind. I think that it is enough to bring the case within s. 16 if the person brought before the justice has so lost mental control of his own actions that he has assaulted his father and mother, and pulled down the curtains in his home, and cannot be relied on not to repeat his acts. If he has shown other signs of unusual vehemence, these, though they may not, taken per se, afford evidence of such want of self-control as would render him dangerous to others as a member of society, may yet be relevant facts on the question of power of self-restraint. Your Lordships had the advantage of seeing the appellant at the Bar of this House. He has obviously certain unusual gifts and is in some ways an exceptional person, possibly better perhaps in these respects than many of his neighbours. But he is equally obviously of an excitable temperament. To-day he is sane in his conduct, and probably was so very soon after the occurrences in question. But the point is whether at the time of these occurrences he had so lost his capacity for self-control as to be, temporarily at least, to all appearance of unsound mind within the meaning of a statute which takes account of his relations to others as well as to himself.

My Lords, at the trial the appellant called witnesses.

Dr. Risien Russell gave evidence to the effect that, after examining him about two months after the inquiry complained of, he found no trace of insanity, and also that he could find in the medical certificate and reception order no adequate grounds on which to justify certification; but on cross-examination it turned out that he had neither been told that three years earlier the appellant had been under observation at the Islington Workhouse, nor that he had bitten his father's hand and attacked his mother. He admitted that these were facts which he ought to have been told. The facts as to heredity, he said, were of importance, but it did not follow that because there had been evidence of possible temporary insanity in the cases of both the father and the grandfather of the appellant he himself was necessarily to be presumed insane. He agreed that it was possible that a person might be suffering from certain forms of insanity in the beginning of a month and might be quite sane at its end. Mr. Morris, M.P. for North Battersea, for whom the appellant had worked at an election, thought him intelligent, conscientious, and a hard worker; he also thought him peculiar in appearance. He appears to have seen nothing of him at the date that is material. Mrs. White, a physician with some experience of mental cases, although she had never certified any one, gave evidence for the appellant, that he never showed any sign of being mentally deficient. She had seen him in a committee room of the House of Commons on March 20, the day before he was handed over to the police, and again after his escape on April 13; but it appears from her cross-examination that she was devoting nearly her whole time to the question of the proper administration of the lunacy laws. She admitted that there were certain points recorded about the appellant which might be matter for inquiry. These were the most important witnesses for the appellant at the trial. The evidence of others whom he called was not relevant in the same degree. Atkin L.J., after remarking that the appellant had admitted at the trial the holding of eccentric opinions, and doing acts in 1916, when he was detained temporarily

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

at the workhouse, which unexplained might be some evidence to negative the imputation to the respondents of lack of reasonable care, goes on to say that the strength of the appellant's evidence lay in his appearance and demeanour as presented to the jury, and in the way in which he presented his case in the Court of Appeal. He thought that, having regard to Mrs. White's evidence as to his condition just before and after the inquiry, and to the evidence of other witnesses who saw him just after his escape, if the respondents had considered the case with any reasonable care, they would at least have formed the opinion that further inquiries should be made, and have given the appellant the opportunity of putting before them the evidence which he had available. There was, he thinks, a question of fact for the jury as to whether the certificate upon which he was confined recorded more than the "flimsy stuff" upon which perfectly sane persons are sometimes incarcerated in lunatic asylums.

My Lords, I think that this criticism loses sight unduly of the measure of the duty which the law imposes in procedure under s. 16. The justice has to act promptly in ordering what is only temporary detention and care, and he has to be guided in ordering this by considerations of the safety, not only of the alleged lunatic, but of the public generally. The medical practitioner is directed by Form 8 as to the facts that must be established in the certificate, if he is to come to the conclusion that the person concerned is of unsound mind and a proper person to be taken charge of and detained under care and treatment. As I have said, we are not trying the question whether the appellant was actually of unsound mind at the time of the inquiry, but the different question, whether on the facts as they stood there was want of reasonable care in coming to the conclusion expressed in the certificate and the reception order. Parliament has laid down a standard, and speaking for myself, I do not think that there was any evidence to go to the jury that there was a failure to observe it. As to the respondent Anklesaria, I agree with Bankes L.J., in the reasons he gives for holding that this was so in his case. It will be observed that even Mrs. White's

evidence is directed to the expression of opinions on what she had heard of particular acts taken in isolation. She had not any such opportunity as Anklesaria had of continuous observation in the light of a full record of what had happened immediately before the appellant was brought to the workhouse; and as to that, so far as the narrative of facts is concerned, there is no real conflict of testimony. As to Griffiths, I have come to the same conclusion on this point. Assuming, as for this purpose only I do assume, that he did put the question which the appellant says he put to him, but which he himself denies having put, whether if let off that time he would promise not to quarrel with his people again, I think that the question might well have been put, not as importing any promise, but as a test to see whether the appellant would express contrition, or otherwise reply in such a fashion as might afford some guidance as to whether his violence had been only the outcome of temporary excitement on the part of a person otherwise under self-control.

I have come to the conclusion that as regards both respondents, this House ought to exercise the powers it has by virtue of Order XL., r. 10, of the Rules of the Supreme Court, and Order LVIII., r. 4. The question is not whether there was literally no evidence to go to the jury on the issue as to want of proper care, but whether there is none that ought reasonably to satisfy the jury that in point of fact such care was not taken. As a Court of Appeal we have power to dispose of this case by giving judgment for the respondents if we are satisfied that on no question of fact which the appellant is entitled to have submitted to a jury is there evidence in his favour on which that jury could properly find a verdict for him.

My Lords, this conclusion renders it unnecessary that I should enter into other questions of law which have been raised. I only wish to say that while I think it probable that if the matter were argued out Anklesaria would be found to have been under a duty to the appellant to exercise care, the precise nature of this duty would require consideration before it could be exactly defined. The duty cannot arise out of contract, because there was no contractual relation

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

between Anklesaria and the appellant. It may more readily depend on an obligation existing on the part of the former to abstain from acting tortiously towards the appellant, in such a way as to give rise to a wrong bearing analogy to a trespass, and cognizable by what used to be an action on the case. The measure of care required on the part of Anklesaria in order to avoid what would constitute injuria would remain to be determined. I think that this is a question which would involve for a satisfactory judgment a good deal of research into the development of the common law, and the distinction which has grown up between the measure of liability in tort as contrasted with that based on assumpsit. There exists a large amount of material, accumulated in connection with this somewhat obscure question, on both sides of the Atlantic Ocean, and I think it better to express no opinion in the absence of an adequate presentation of the results of that research. Such a presentation was, of course, impossible in the present appeal, and I only wish to add that I do not see how it could have assisted the appellant's case had it been undertaken.

The concluding observation I wish to make is about the legal position of the respondent Griffiths. As chairman of the Board of Guardians, appointed under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of persons in pauper lunatic asylums, his order when signed has " effect as if made by a Justice of the Peace " under the Act of 1890.

My Lords, the operation of the section appears to me to invest the person so appointed with the duties and also with the protection in discharging them attributed to a justice by s. 16 of the latter Act. In the present case it is not in dispute that Griffiths acted bona fide, and was satisfied that the appellant was of unsound mind and proper to be detained. If that had not been so he would have been exceeding his jurisdiction in making the order. But as he was in point of fact and of law acting within that jurisdiction, and as the formal requirements of the statutes as to inquiry and certificate had been complied with, can he be made liable for want of skill or of care in the performance of his function ?

As to skill, it is plain that he has been designated to perform that function, apart from any qualification as an expert. He is, like an ordinary justice of the peace, to rely on others for expert advice, and is to judge for himself on the materials he obtains. As to care, the Legislature has entrusted him with a discretion as to which two views are possible. One is that a person in the position of a justice of the peace enjoys the immunity for acts done judicially that a judge of a court of record enjoys, and that the Justices Protection Act, 1848, affords. The other view is that a person in the position in which Griffiths was is acting only in an administrative capacity, and not as a judge, and may, therefore, be made liable for failure to exercise reasonable care.

My Lords, the question so stated would be one of considerable difficulty, if we were called on in the present appeal to decide it abstractly, as one depending on a general principle. The tendency of modern legislation has recently been to entrust to many who are prima facie only administrative officers, functions which have some judicial attributes at all events, although they remain primarily administrators. What protection do they enjoy ? The point of law is to-day not as simple as it was, comparatively speaking, some years ago. The recent decisions of this House in *Board of Education* v. *Rice* (1) and in *Local Government Board* v. *Arlidge* (2) indicate that in the case of administrative awards there are at least some enforceable obligations which those making them must observe. What these are and to what extent they go has to be ascertained by considering the statutes creating the quasi-judicial powers, and the particular forms in which a general principle has been implied in the establishment of such judicial authority. This question may prove in particular cases a delicate and obscure one. Some limitation of the application in such instances of the broad principle of complete judicial immunity may well prove to be involved in its resolution. I should here again be loath to try to lay down general principles in answer to what is a fresh legal problem of far-reaching importance, without

(1) [1911] A. C. 179. (2) [1915] A. C. 120.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Haldane.

having heard full argument. I should be the more reluctant to attempt to do so because I think that no such general question really arises here. For provided that the person entrusted by Parliament with the statutory duty of satisfying himself in the fashion prescribed by the Act of 1890 and then to act, in fulfilment of the statutory duty which is that of the justice under s. 16, keeps within his jurisdiction, observing the prescribed conditions, and acting bona fide and honestly, I think that he is doing only what Parliament has called on him to do, and has thereby made lawful, and that the only tribunal that could make him responsible for a mistake in the exercise of the discretion entrusted to him must be such, if any, as is expressly established by Parliament for the purpose. If he does his best to act fairly within the limits laid down for him, he has acted up to the standard prescribed and I do not think he can be made liable to an action at common law for want of care beyond this. For assuming that he has actually satisfied himself, acting honestly and bona fide in arriving at his conclusion and proceeding on it, he has done the very thing which the statute told him to do, and no further question arises. Assuming this to be so then the provisions of s. 330, which were introduced in order to cover other persons and not merely himself, afford to him no more than an additional defence, and do not derogate from that to which he has become entitled on a more general principle applicable to the position in which the Legislature has placed him.

My Lords, for this additional reason I think that in the instance of the respondent Griffiths there was no case to lay before a jury in this action. I have already said that on the other ground to which I have referred earlier I do not think that there was in the instance of either himself or the respondent Anklesaria any such case. I am therefore of opinion that the action must be dismissed.

VISCOUNT FINLAY. My Lords, this action was brought to recover damages from the defendants in respect of the plaintiff's detention as a lunatic under an order made by

the defendant Griffiths and upon the certificate of the defendant Anklesaria. Mr. Griffiths was the chairman of the Board of Guardians in the parish of St. Mary, Islington, and Dr. Anklesaria was the medical officer of the workhouse of that parish. The plaintiff alleges that the order and certificate were issued not in good faith and without reasonable care.

The case was tried before the Lord Chief Justice with a special jury. The question left to the jury was whether the defendants had acted with reasonable care. The jury were unable to agree and were discharged, and the Lord Chief Justice, upon further consideration, entered judgment for both the defendants upon points of law. An appeal by the plaintiff to the Court of Appeal was dismissed, Atkin L.J. dissenting. The plaintiff in the present appeal to your Lordships' House asks for a new trial.

The statutes applicable to the proceedings taken in this case are the Lunacy Act, 1890, and the Lunacy Act, 1891.

The Act of 1890 provides (s. 4) that, subject to certain exceptions, a person not being a pauper or a lunatic so found by inquisition shall not be received or detained as a lunatic unless under a reception order made by the "Judicial Authority." The "Judicial Authority" is defined by s. 9 as amended by the Act of 1891. Before making any order the judicial authority has to consider the petition and make any inquiries which are thought proper (s. 6). Provision is also made for urgency orders (s. 11), and in the case of paupers for summary reception orders to be made under s. 16 by a justice of the peace or the chairman of the Board of Guardians if so empowered by the Lord Chancellor. The summary order was made in the present case under s. 16 by Mr. Griffiths as chairman so empowered and on the certificate of Dr. Anklesaria that the plaintiff was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment.

The plaintiff, a young man of twenty-three years of age, was in March, 1919, residing in his father's house at 59, Southgate Road. On March 21 his mother called in the police,

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

alleging that the plaintiff was of unsound mind, and he was removed by Inspector Owen and Police-constable Crookes to the workhouse under s. 20 of the Act of 1890, which makes provision for three days' detention in such cases. The plaintiff was attended in the workhouse by Dr. Anklesaria on the 21st, 22nd, and 23rd; and on Monday, March 24, an inquiry was held by the defendant Griffith as to the state of mind of the plaintiff, the defendant Anklesaria being present. The "case paper" giving particulars of the plaintiff, including particulars of an occasion in 1916 when he had been brought to the workhouse as an alleged lunatic, was examined by Mr. Griffiths, and the mother of the plaintiff and the police-constable were examined on oath. The plaintiff was then called in, and Mr. Griffiths had some conversation with him. On the same day Dr. Anklesaria gave the certificate, the material parts of which are as follows:—

"1. I am a person registered under the Medical Act, 1858, and I am in the actual practice of the medical profession.

"2. On the 24th day of March 1919, at Islington Institution, in the County of London, I personally examined the said Harry Gordon Everett, and came to the conclusion that he is a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment.

"3. I formed this conclusion on the following grounds, viz.:—

"(A) Facts indicating insanity observed by myself at the time of examination, viz.:—

"Does not want to work, says he has not worked before and he does not see why he should work as his father is rich (he is not) enough to support him, thinks his lungs are not well developed.

"(B) Facts communicated by others, viz.:—

"Marian Everett, mother, 59, Southgate Road, Islington, says:—'Patient has been a great trouble recently, won't do any work, lies in bed till middle of day, worries me all the time, asks me questions for

hours at a time. Strikes me without provocation, worries people selling food, accuses them of breaking the law, which they haven't done. On the 21st March the patient was violent, dragged the curtains down, struck his father, and adopted a threatening attitude, so she had to call a policeman.'

"Francis Thomas Crookes, P.C. 114 G, says:—'The patient strange in manner, the curtains were dragged down, saw him in a violent attitude, talked about food, suffrage, and peace at any price.'

"4. The said Harry Gordon Everett appeared to me to be in a fit condition of bodily health to be removed to an asylum, hospital or licensed house."

This certificate was torn up by the plaintiff. A copy of it was made (Appdx. p. 13) in which there was an accidental omission of some words.

On the 25th the defendant Griffiths made the order. It runs as follows:—

"I, H. J. Griffiths, having called to my assistance Kaiku Ardesir Anklesaria, of the Islington workhouse, St. John's Road, Upper Holloway, a duly qualified medical practitioner, and being satisfied that Harry Gordon Everett, single, of 59, Southgate Road, Islington, N., is in such circumstances as to require relief for his proper care and maintenance, and that the said Harry Gordon Everett is a lunatic, and is a proper person to be taken charge of and detained under care and treatment, hereby direct you to receive the said Harry Gordon Everett as a patient into your asylum. Subjoined is a Statement of Particulars respecting the said Harry Gordon Everett."

This order was addressed to the superintendent of the asylum at Colney Hatch.

The plaintiff was taken to Colney Hatch Asylum. He remained there until his escape on April 9, and the action was commenced on June 4, 1919.

The case of the appellant was argued at the Bar, as in the Courts below, by the appellant in person. It is necessary to consider the claims against the two defendants

H. L. (E.) 1921

EVERETT v. GRIFFITHS.

Viscount Finlay.

separately. I take first the claim against the defendant Griffiths.

The first point to be considered is what was the duty imposed upon Mr. Griffiths in acting under s. 16 of the Act of 1890. The Statement of Claim alleges that the defendant Griffiths did not act in good faith and that he did not exercise reasonable care. The latter ground was that mainly insisted upon by the plaintiff in his argument, but I did not understand that there was any definite withdrawal of the charge of want of good faith.

Before the Lunacy Act of 1890 medical certificates were necessary for detention, but there was no provision for any order by a justice of the peace or other authority as a necessary condition precedent to the right to detain an alleged lunatic. Provision was made for the protection of certain persons acting in the execution of the Lunacy Acts, but not for the protection of the relative or other person signing the request for detention. The person so procuring the detention of the alleged lunatic had to prove, if sued, that the patient was in fact insane.

A vital change was made by the Act of 1890. The normal procedure under that Act is that a reception order can be made only by the judicial authority, and by s. 6 elaborate provision is made for the procedure in considering petitions for such an order. The judicial authority may make an order on such petition or dismiss it. There may, of course, be cases of urgency for which special provision is made by authorizing the making of an urgency order by a relative (s. 11). The proceedings in the case of the plaintiff were not on petition nor by urgency order, but under s. 16, which forms one of a group of sections dealing with "Summary Reception Orders." Sect. 13 authorizes the making of such orders in the case of any lunatics not under proper care and control and not being paupers or wandering at large. Sect. 15 makes provision for bringing before a justice any alleged lunatic found wandering at large, and s. 16 makes provision for dealing by summary order with such persons so brought before him and with paupers.

Before further considering the effect of the statutory provisions, I think it desirable to make one observation of a general kind. A great deal was said in the course of the argument based on a supposed analogy between proceedings for the detention of an alleged lunatic and proceedings for the punishment of an alleged criminal. But in truth the two cases do not stand on the same footing. In the case of an alleged criminal the question is as to his guilt, and, if guilty, how he should be punished. In the case of an alleged lunatic the question is of the existence of the disease of lunacy, and, if this be established, whether it is desirable that the lunatic should be detained for the purpose of treatment and for the safety of other persons. This difference is fundamental and must be borne in mind in the consideration of every stage of the proceedings. Lunacy is not an offence and it may be undesirable to tell the person that he is suspected of being insane, while any one charged with a crime is entitled to be told what it is.

As the proceedings in the present case were taken under s. 16 a careful consideration of that section is essential. The following are its terms: [His Lordship read the section.] This section imposes a duty upon the justice before whom any such alleged lunatic is brought. He "shall call in a medical practitioner and shall examine the alleged lunatic and make such inquiries as he thinks advisable." The section goes on to lay down the action to be taken by the justice. If, in the case of a pauper, the justice is satisfied that he is a lunatic and the medical practitioner signs a medical certificate (Form 8), the justice may by order direct reception and detention in the institution for lunatics named in the order. The power to make the order conferred upon the justice involves that it is his duty to make it if he is satisfied that the case is a proper one to be dealt with under the section.

It was contended for Mr. Griffiths that in acting under s. 16 he was in the position of a judge, and therefore enjoyed complete immunity in respect of any judicial act done by him. If this were the case no action against him in respect of any such judicial act would be competent, even if it were alleged

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

that there was malice and want of reasonable and probable cause. The grounds of this immunity for judicial acts have been often explained. It is enough to refer to *Fray* v. *Blackburn* (1), and to the concluding sentences of Lord Watson's judgment in *Haggard* v. *Pélicier Frères*. (2) This immunity is not confined to judges of the High Court. It extends to all judges. The protection given to justices of the peace by the first section of the statute 11 & 12 Vict. c. 44, is not wanted, and does not apply, in respect of acts of a purely judicial nature relating to matters within the justices' jurisdiction. Its protection is wanted in respect of acts of a ministerial character, and its provisions have not the effect of rendering justices of the peace liable to be sued in respect of purely judicial acts, even if alleged to be malicious.

It is not necessary for the purposes of the present case to decide whether the justice of the peace, and the chairman authorized under s. 25 of the Act of 1891 to deal with cases under s. 16 of the Act of 1890, are entitled to complete judicial immunity. There is another class of cases, of which *Partridge* v. *General Medical Council* (3) is an example, in which persons discharging public duties of this nature are not liable to be sued so long as they act honestly. I am clearly of opinion that a justice of the peace or chairman of guardians acting under s. 16 cannot be made liable for want of care so long as he acts honestly in the discharge of the duties imposed upon him by the statute.

The section casts upon him the duty of making the order if "satisfied" of the necessary facts. This, of course, imports that he must be honestly satisfied, but if the justice of the peace or chairman is so honestly satisfied he cannot be made liable on the ground that he has been negligent in arriving at his conclusion. So to hold would in fact be to make him liable to be harassed in the honest execution of his statutory duties by actions in which a jury would be invited to say that he was negligent in arriving at his conclusion. I put upon the term "satisfied" as used in s. 16 the interpretation which

(1) (1863) 3 B. & S. 576. (2) [1892] A. C. 61, 68.
(3) 25 Q. B. D. 90.

was put upon this word as used in s. 20 : *Harward* v. *Hackney Union* (1) ; *Welsh* v. *Duckworth*. (2)

It is to my mind quite clear that there is absolutely no evidence that Mr. Griffiths acted otherwise than in perfect good faith. Negligence, even if established, would not create any liability so long as he acted honestly.

The plaintiff charged both defendants with negligence. It has been contended by Mr. Rawlinson that there was no evidence which could properly be submitted to a jury of want of reasonable care in the case of either defendant. The submission was made to the Lord Chief Justice at the trial, but he left the question to the jury, reserving questions of law. On the further consideration this point was again urged but the Lord Chief Justice took no notice of it in his judgment. He decided in favour of the defendant Griffiths on the ground that he was exercising judicial authority, and that he could not be sued in respect of a judicial act. I agree with his conclusion on this point, reserving, however, as I have said, the question whether Mr. Griffiths enjoyed complete judicial immunity, as it is enough for the purposes of this case that there is no evidence of any want of honesty on his part. The Lord Chief Justice decided on such further consideration, in favour of Dr. Anklesaria, upon the ground that it was not any act of his which caused the detention. "He was consulted," the Lord Chief Justice said (Appdx. p. 29), "in an advisory capacity. His opinion was expressed to the justice of the peace in good faith and the justice acted upon it. There is an interposition of the act of the justice which constitutes the detention. It is not the medical certificate which causes the detention, it is the order of the justice which brings about the detention." I regret that I am unable to concur with the Lord Chief Justice as to the validity of this ground for his decision. If it be a duty on the part of the medical man to exercise reasonable care in giving the certificate I think it is impossible to exclude from consideration as an element of damage flowing from such a certificate of lunacy, if negligently given, the fact that the

(1) 14 Times L. R. 306. (2) (1902) 18 Times L. R. 633.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

order followed. By the terms of s. 16, but for the existence of the certificate the order could not be made at all. And further we cannot leave out of account the effect which that certificate might and in all probability would have on the mind of the justice who made the order. Not only is the medical certificate a condition precedent to the making of the order, but it may also have a most important effect in leading the justice to the conclusion that the person is a lunatic.

In the Court of Appeal Bankes L.J. held that judgment must be entered for the defendant Griffiths on the ground that he was honestly satisfied that the order ought to be made, and for the defendant Anklesaria on the ground that while he was under a duty to the alleged lunatic to act with reasonable care there was, in the opinion of the Lord Justice, nothing which should have been submitted to the jury as evidence of a want of proper care on the part of this defendant. Scrutton L.J. was of opinion that judgment should be entered for the defendant Griffiths on the same ground as that taken by Bankes L.J. and for the defendant Anklesaria on the ground that he owed no duty to the alleged lunatic except that of acting honestly, and also, on the ground taken by the Lord Chief Justice, that it was the order and not the certificate which caused the detention. Atkin L.J. differed from his colleagues and was of opinion that each defendant owed to the plaintiff the duty of acting with reasonable care and that there was evidence fit to be left to the jury of a want of reasonable care on the part of each.

The question as to what constitutes evidence fit to be left to the jury is a question of law for the Court. For this purpose a mere scintilla of evidence is not enough. There must be evidence on which the jury might reasonably come to a conclusion in favour of the plaintiff: per Willes J. in the Exchequer Chamber in *Ryder* v. *Wombwell*. (1) If the evidence lead only to conjecture it is not fit for the consideration of the jury: per Willes J. in *Phillipson* v. *Hayter* (2), citing Lord Tenterden and Cresswell J. Of course the judge cannot

(1) (1868) L. R. 4 Ex. 32, 39.

(2) (1870) L. R. 6 C. P. 38, 42–3.

withdraw a case from the jury merely on the ground that in his opinion a verdict for the plaintiff would be unsatisfactory: per Lord Blackburn, in *Metropolitan Ry. Co.* v. *Jackson*. (1) Where there is conflicting evidence, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it to the jury: *Dublin, &c., Ry. Co.* v. *Slattery*. (2)

It has been held in the Court of Appeal that Order LVIII., r. 4, confers upon the Court of Appeal power to enter judgment for the defendant if it is satisfied that a verdict in favour of the plaintiff would be set aside as unreasonable although there was evidence fit to be left to the jury. There has been some difference of opinion on this point: see *Millar* v. *Toulmin* (3); *Skeate* v. *Slaters* (4); *Winterbotham* v. *Sibthorp* (5); *Banbury* v. *Bank of Montreal*. (6) The point may have to be settled by this House in some other case. I do not propose to consider it now, as in my opinion this is in no way necessary for the purposes of the present case. I shall deal with the case on the footing of the opinion of Willes J. in *Ryder* v. *Wombwell* (7) and assume that the boundary between the provinces of the Court and of the jury has not been altered by the rules under the Judicature Act. Such a method of dealing with the case is more favourable to the plaintiff than the adoption of the view that the powers of the Court of Appeal have been extended by the rules.

It is not necessary to consider whether there was any evidence against the defendant Griffiths of want of reasonable care, inasmuch as having acted honestly he is entitled to judgment in his favour even if there had been negligence.

For the purpose of this case your Lordships assume without deciding that the defendant Anklesaria owed to the plaintiff the duty of ordinary care, and this question has not been

(1) (1877) 3 App. Cas. 193, 208.
(2) (1878) 3 App. Cas. 1155.
(3) (1886) 17 Q. B. D. 603; (1887) 12 App. Cas. 746.
(4) [1914] 2 K. B. 429.
(5) [1918] 1 K. B. 625.
(6) [1918] A. C. 626.
(7) L. R. 4 Ex. 32, 39.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

argued. The question which has to be dealt with is whether there is evidence of a breach of that assumed duty. I propose to consider this question with reference to (A) the points made by Atkin L.J. and the evidence he refers to, (B) the points made in the statement handed in by the appellant, and (C) the evidence of defendants' witnesses.

(A) This question has been subjected to a most careful examination as regards both defendants by Atkin L.J., and I propose in the first instance to deal with the points on which the Lord Justice thought that there was evidence, confining myself, of course, to the case as against Dr. Anklesaria.

I. The first point with which the Lord Justice deals under this head is stated by himself thus: "But the strength of the plaintiff's evidence, I think, lay in his own appearance and demeanour as presented to the jury, coupled with affirmative evidence he produced from which the jury might believe, if they chose, that he was substantially the same at the material date, March 24th, 1919." (1) He refers to the ability with which the plaintiff conducted his case, and to the evidence of two witnesses called by him at the trial. The first of these was Dr. White, a lady who knew the plaintiff well and saw him on Thursday, March 20, 1917, at the House of Commons. She there had a discussion with the plaintiff in the Lobby, and spoke to his perfect sanity on that occasion and also on April 13, four days after his escape, and every day for ten days thereafter. The second of these witnesses was Miss Robertson, to whose house the plaintiff came on April 9 after his escape. She knew him well and never saw any symptom of insanity.

If the question were whether the plaintiff was in fact insane, this evidence would be cogent. But the question is whether there was a want of ordinary care on the part of Dr. Anklesaria in certifying that he was insane on March 24, 1919. Dr. Anklesaria had seen the plaintiff on March 21, 22 and 23, and again on Monday, 24, the day on which he was examined before Mr. Griffiths. The case must be looked at as it presented itself to Dr. Anklesaria on these occasions. The

(1) [1920] 3 K. B. 220.

question whether he took proper care must be determined with reference to the materials before him.

II. The Lord Justice goes on to refer to the statement prepared by the plaintiff after his escape giving an account of what took place before the chairman. The Lord Justice says that this statement shows a logical, sane sequence of answers by the plaintiff, and indicates that neither the chairman nor the doctor addressed any inquiry to the plaintiff as to suggested unprovoked attacks upon the mother, want of control at night and insane delusions as to the wealth of his father and the condition of his own health.

This statement consists almost entirely of an account of the conversation between the chairman and the plaintiff. The only reference in it to Dr. Anklesaria, is in the passage, at letter C. on p. 128: "Defendant Griffiths then said to the doctor, 'Do you wish to ask him any question?' Defendant Anklesaria (smiling and still engaged in writing his certification papers): 'No; I do not want to ask him any questions.'" It must be remembered that the plaintiff had been examined by the doctor in the course of the three days he had spent in the workhouse, 21st, 22nd and 23rd, and the examination on the 24th was that prescribed by s. 16, which says that "the Justice shall call in a medical practitioner, and shall examine the alleged lunatic, and make such inquiries as he thinks advisable." The doctor had before him the materials for forming an opinion during the days when he had the plaintiff under observation, and there is nothing to show negligence in the fact that he did not put further questions on the 24th.

III. The third point adverted to by the Lord Justice is the evidence of Dr. Risien Russell, an eminent specialist, who examined the plaintiff on June 20, 1919, and stated at the trial that he failed to discover in him any trace of insanity, and that he could not find in the medical certificate and reception order any adequate ground on which to justify certification. The Lord Justice expressed the opinion that this supplies evidence of negligence on the part of Dr. Anklesaria in certifying. It must, however, be remembered that

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

Dr. Risien Russell's examination of the plaintiff was on June 20, and the material dates in this case are from March 21 to 24, and it does not at all necessarily follow from Dr. Russell's evidence that he would have arrived at the same conclusion if his examination had been at the earlier date. The question, however, is not whether in March the plaintiff was actually insane; the question is whether the defendant Anklesaria was negligent in arriving at the conclusion that he was. In considering this question it must be borne in mind that Dr. Anklesaria had had the plaintiff under observation for three days, and in this connection the answers of Dr. Russell to questions 76, 77 and 78 seem to me to be of importance :—

"76. *Q.* We understand you are a great specialist, and give evidence in these courts from time to time. I suppose a doctor must judge very largely from conversation with a patient, and form his view, things which you could not write down very well, but conversation over the table ?—*A.* Quite.

"77. *Q.* It is difficult to put down in writing everything that goes to make up your opinion ?—*A.* Quite.

"78. *Q.* And therefore a doctor has to see and talk to the patient and come to an opinion on things which very largely he cannot put down on paper ? *A.* Yes, that is so."

The jury might, on the evidence before them, have found that the plaintiff was not insane between March 21 and 24, but whether Dr. Anklesaria was negligent in certifying him as insane at that time must depend on the evidence as to what materials he had before him when he arrived at his conclusion.

IV. The fourth point to which Atkin L.J. referred as evidence of negligence was the failure to comply with s. 28 of the statute of 1890, which requires that every medical certificate shall state the facts upon which the medical practitioner has formed his opinion. The Lord Justice says that this must mean all the facts, and that certain facts on which the doctor relied are not stated in the certificate. I agree with the Lord Justice that s. 28 directs that the certifying medical practitioner shall state all the facts on

which he formed his opinion. It does not, however, at all follow that the omission to state all the facts which influenced his mind shows negligence in forming his opinion. It may be difficult to put on paper the effect of personal observation of the alleged lunatic, and even if there were a failure to comply with the statutory direction to state all the facts it would not show that the conclusion was negligently arrived at. The certificate may be defective in form and style without showing that there was negligence in the diagnosis of insanity.

With the greatest respect for the opinion of Atkin L.J., I am unable to agree with his conclusion that there was evidence of negligence on the part of Dr. Anklesaria in forming his opinion that the plaintiff was insane at the time of his certificate.

(B) The plaintiff himself has handed in a statement of the grounds on which he says there was evidence of negligence on the part of both defendants, and I shall now consider these grounds so far as they relate to the defendant Anklesaria.

The first charge is that inquiry should have been made of the plaintiff as to the "case paper" giving the history of his illness. I cannot see that there was any negligence on the part of Dr. Anklesaria in accepting for the purposes of the inquiry the statements in the case paper. There was nothing to suggest that they were unreliable and it does not appear that they were in fact inaccurate in any material respect.

The second, third and fourth grounds appear to be directed against Mr. Griffiths.

The fifth ground, and also the sixth, which is given as an alternative to the fifth, relate to the failure to make inquiries of the plaintiff or of others as to the alleged grounds of insanity. What inquiry should be made must be largely a matter of discretion. It cannot be assumed that there is a duty to make further investigation if the information is given by a credible person, and there is nothing to cast doubt upon it. It is Dr. Anklesaria's own observation of the plaintiff which is of primary importance.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Finlay.

The seventh ground seems to be largely based on the mistaken analogy between proceedings in lunacy and criminal proceedings to which I have already adverted.

The eighth ground is that Dr. Anklesaria failed to make inquiries as to whether the plaintiff had any medical adviser. It does not appear that there was anything to suggest the propriety of inquiry on this point.

The ninth, tenth, eleventh and twelfth grounds relate solely to the defendant Griffiths.

The thirteenth ground is a mere statement that the defendant Anklesaria did not reasonably come to the conclusion stated in his certificate.

The fourteenth ground is that the facts stated to have been observed by Dr. Anklesaria himself in no way justify a reasonable conclusion of insanity. These facts by themselves would, I think, be insufficient, but they could not be disregarded in dealing with the case as a whole by the light of the other matters stated.

With regard to the fifteenth ground, I need only say that it does not appear to be material for this purpose, whether these facts were observed on the fourteenth or at an earlier interview.

The sixteenth ground is, I think, covered by what I have already said.

The other grounds do not appear to call for special notice. They are, I think, covered by the observations I make in other parts of this judgment.

(C) The question whether there was evidence fit to be left to the jury, of want of care must depend upon the view of the situation as a whole with which Dr. Anklesaria had to deal in March, 1919. It is necessary to supplement what I have already said by referring to the evidence for the defendants.

[His Lordship referred to the evidence adduced on behalf of the defendants and continued :] Upon a review of all the evidence I cannot see that there was any evidence proper to be left to the jury on the question whether Dr. Anklesaria was guilty of want of reasonable care in

his examination of the plaintiff and in certifying that he was insane on March 24. He had the plaintiff under observation for days and there is nothing to show that he was in any way careless in conducting his examination of the case. There is nothing to suggest any want of good faith. He may have been mistaken in his conclusions. But a doctor cannot be made liable for a mere mistake. There must be something further, such as mala fides or negligence.

In my opinion, the appeal should be dismissed as regards both defendants, upon the grounds I have stated as to each.

VISCOUNT CAVE (read by LORD ATKINSON). My Lords, the facts have been fully stated; and all that need be here mentioned is that on March 25, 1919, the respondent Griffiths (who was then chairman of the Islington Board of Guardians), acting under s. 16 of the Lunacy Act, 1890, and s. 25 of the Lunacy Act, 1891, signed a summary order for the reception and detention of the appellant as a lunatic, such order being annexed to a certificate of the respondent Anklesaria (a medical practitioner), stating that he had personally examined the appellant and had come to the conclusion that he was a person of unsound mind. The appellant was for some days confined under this order in the Colney Hatch Asylum, but on April 9 he escaped and was not again certified. On June 4 he brought this action, alleging that the respondents had certified him insane without good faith or reasonable care, and claiming 100*l*. damages. The charge of bad faith was not pressed at the hearing, and there was not a particle of evidence in support of it; and it may therefore be set aside. At the trial the issue of want of reasonable care was put to the jury, who disagreed; and the Lord Chief Justice gave judgment for the respondents on the law. This decision was confirmed on appeal, Atkin L.J. dissenting, and thereupon this appeal was brought.

The appellant, who argued his case in person with considerable ability, contended that the respondents, the defendants in the action, were jointly liable for the negligence

H. L. (E.) 1921

EVERETT v. GRIFFITHS.

Viscount Cave.

of either of them; but there is no ground for this contention, and the case made against each defendant must be considered separately.

I will take first the case against the defendant Griffiths, and I think it important to determine whether as against a person in his position an action for want of reasonable care will lie. This defendant was empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of pauper lunatics in institutions for lunatics, the word "pauper" including (by virtue of s. 18 of the Lunacy Act, 1890) any person in such circumstances as to require relief for his proper care. This authority obviously empowered the defendant Griffiths to take the necessary steps leading up to an order under s. 16 of the Act of 1890, and accordingly placed him for the purposes of that section in the position of a justice of the peace. The last-mentioned section is in the following terms: [His Lordship read the section.] This section requires the justice before whom a pauper alleged to be a lunatic is brought under s. 14, sub-s. 2, first to call in a medical practitioner; secondly, to examine the alleged lunatic; and thirdly, to make such inquiries as he thinks advisable; and, if upon such examination "or other proof" the justice is "satisfied" that the alleged lunatic is a lunatic and a proper person to be detained, and if the medical practitioner who has been called in signs a medical certificate with regard to the lunatic—that is to say, a certificate that he is of unsound mind and a proper person to be taken charge of and detained under care and treatment, with reasons for such statement—then the justice may make a summary reception order. In the present case all these conditions were fulfilled. The defendant Griffiths, on March 24, 1919, called in the defendant Anklesaria (who was the medical officer of the Union and had had the patient under observation for three days) to his assistance, heard the sworn statements of the plaintiff's mother and of a constable who had seen the plaintiff at his home, questioned the workhouse attendant as to the plaintiff's conduct, and read the "case-paper" containing particulars of the plaintiff's

family history and his previous detention at the workhouse; and on these materials he became satisfied that the plaintiff was of unsound mind. The defendant Anklesaria on the same day signed the medical certificate above referred to, and on the following day the defendant Griffiths signed the reception order.

The plaintiff, however, alleges that the defendant Griffiths acted negligently and without reasonable care on the following grounds, which I take (with some condensation) from a written summary of points put in by the plaintiff during the argument before your Lordships' House. He says that the defendant Griffiths (1.) allowed his mind to be prejudiced by reading the case paper before examining the plaintiff; (2.) heard the evidence of the plaintiff's mother and the constable without allowing the plaintiff to be present and to cross-examine them; (3.) failed to make independent inquiries into the truth of the evidence given by those witnesses; (4.) omitted to inform the plaintiff of the purpose of the examination or of the allegations made against him or to question him as to the more important of those allegations; (5.) gave the plaintiff no opportunity to make a statement or to call witnesses as to his sanity; and (6.) founded the reception order upon a medical certificate upon the face of which it appeared that the facts indicating insanity observed by the certifying medical practitioner himself were not, in fact, any indication of unsoundness of mind. Having regard to the plaintiff's admissions in argument, the above enumeration requires some modification even as a statement of the plaintiff's case; for it is plain, on the plaintiff's own evidence at the trial, that he knew the purpose for which he was being examined, and that at the examination he was invited to make, and in fact made, a statement on his own behalf. Even with these modifications, the allegations of the plaintiff were to some extent denied by the defendants at the trial; but it is obvious that where the evidence is in conflict a jury might conceivably accept the plaintiff's version, and accordingly for present purposes I assume that version to be true.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Cave.

But even on this footing, and assuming the plaintiff's evidence to be accurate in every respect, it appears to me that it will not support an action against the defendant Griffiths. The plaintiff's complaints numbered (1.), (2.) and (6.) have no weight. The defendant Griffiths was clearly entitled to read the case paper and to hear the evidence of the witnesses before calling the plaintiff into the room, and he was entitled to assume that the facts specified by the doctor as observed by himself were, in the doctor's opinion, relevant facts, and with the facts communicated by others were sufficient to satisfy the doctor of the plaintiff's unsoundness of mind. As to the remainder of the plaintiff's complaints (other than those disposed of by his admissions), they amount, in effect, to this: that the defendant failed to pursue his inquiries as to the plaintiff's sanity far enough and was satisfied upon insufficient materials that he was of unsound mind. But if the language of s. 16 is examined, it becomes clear that these are matters to be determined by the justice or other person acting under that section. The statute has entrusted him with the duty of deciding what inquiries he shall make and what proof he shall require, and of coming to a conclusion upon the materials so obtained. If, indeed, he were to make a reception order maliciously or dishonestly, without being genuinely "satisfied" as to the insanity of the person to be detained, it might be said that the conditions of the section had not been observed. But where (as in this case) the order is made honestly and in good faith, the person making it cannot afterwards be made liable in damages on the ground that he exercised a wrong judgment as to the inquiries which he should make or as to the conclusion which he should draw from the facts proved. So to hold would be to expose a justice, honestly exercising his powers under the section, to the peril of having his judgment reviewed in every case by a jury in an action for negligence. This cannot be the intention of the Act, and, in my opinion, the plaintiff's claim against this defendant is bad in law and judgment was rightly given against him.

The above view is supported by the decisions in *Doswell* v.

Impey (1); *Reg.* v. *Whitfield* (2); *Partridge* v. *General Medical Council* (3); and *Harward* v. *Hackney Union* (4), and it appears to me to be sufficient for the decision of this part of the case. Having regard to the above reasoning, it is, I think, unnecessary to consider the contention advanced by counsel for the respondents that the defendant Griffiths is entitled, in respect of his action, to the absolute immunity which protects a judge of the High Court from civil proceedings in respect of his judicial acts, even though malice or bad faith be alleged: see *Taaffe* v. *Downes* (5); *Hamilton* v. *Anderson* (6); *Fray* v. *Blackburn* (7); *Haggard* v. *Pélicier* (8), and *Anderson* v. *Gorrie* (9); and as to words spoken *Scott* v. *Stansfield.* (10) How far the rule so laid down applies to justices acting under the Lunacy Act is a matter which is left in some doubt upon the authorities, but which may be left undetermined until a justice so acting is alleged and proved to have acted in bad faith. No such case is made in this action.

I should add that the case of *Fletcher* v. *Fletcher* (11), on which the appellant relied as showing that a reception order is void unless the person to be detained is, in fact, a lunatic, has no application to the existing Lunacy Acts; and also that my conclusion in no way depends on s. 1 of the Justice Protection Act, 1848, which appears to me to apply to justices only, or on s. 330 of the Lunacy Act, 1890, which need not be called in aid by a person against whom no case is otherwise made. I base my conclusion on the reasons which I have given, which accord with the view adopted by Bankes L.J. in the Court of Appeal.

The case against the defendant Anklesaria may be more shortly dealt with. Upon the conclusion of the argument of the appellant your Lordships were of the opinion that, assuming that this defendant might in law be sued for want

(1) 1 B. & C. 163.
(2) 15 Q. B. D. 122.
(3) 25 Q. B. D. 90.
(4) 14 Times L. R. 306.
(5) 3 Moo. P. C. 36*n*.
(6) (1858) 3 Macq. 363.
(7) 3 B. & S. 576.
(8) [1892] A. C. 61.
(9) [1895] 1 Q. B. 668.
(10) L. R. 3 Ex. 220.
(11) 1 E. & E. 420.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Viscount Cave.

of reasonable care in examining and certifying the plaintiff, there was no evidence of such want of care to go to the jury; and, accordingly, counsel for the respondents were not called upon to argue the point of law. In this view I fully concur. The defendant Anklesaria had the plaintiff under observation for three consecutive days, and not only examined him physically but conversed with him on each of those days. He questioned the nurse and ward attendant as to the plaintiff's conduct while in the observation room; and he was present at the inquiry conducted by the chairman and heard the evidence of the plaintiff's mother and the constable as well as the plaintiff's own statement. He also had the case paper showing that in 1916 the plaintiff had been notified as of unsound mind on the ground that he had refused to take food and had broken up glass, etc., and that the plaintiff's father and grandfather had shown symptoms of insanity. On these materials he decided to certify the plaintiff as insane; and, although he may have been mistaken in his conclusion, I think it impossible to say that it was arrived at carelessly. It is true that in the medical certificate the facts indicating insanity stated by Dr. Anklesaria to have been observed by himself are of a slender character, and such as (taken by themselves) had very little bearing upon the question of the plaintiff's soundness of mind; and, in this respect, the certificate appears to me to be open to comment. But the omission to state fully the grounds on which the doctor found the plaintiff insane did not invalidate the certificate or cause injury to the plaintiff, and therefore afforded no ground for this action. Of negligence by the doctor in finding the plaintiff insane I can find no evidence at all.

In these circumstances, while I do not desire to be considered as throwing any doubt upon the correctness in point of law of the opinion expressed by Crompton J. in *Hall* v. *Semple* (1), that a medical man who negligently signs a certificate of insanity upon which an order of detention is founded may be made liable in damages for any injury so caused, I express no final opinion upon that point. I must

(1) 3 F. & F. 337, 354.

add, however, that the case of *Thompson* v. *Schmidt* (1) is no decision to the contrary, as the so-called certificate of the doctor in that case was no part of the foundation for the plaintiff's detention. I think the case against this defendant breaks down for want of evidence, and accordingly that the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur. The facts have been already accurately and fully stated. It is quite unnecessary to restate them.

The causes of action upon which the appellant relies in this case can be stated shortly. They are these: (1.) that the respondent Griffiths owed to him (the appellant) a duty not to certify that he was a lunatic without taking reasonable care and that he failed to discharge that duty. And (2.) that the other respondent owed to him a similar duty not to draw up and sign the certificate dated March 24, 1919, without reasonable care, which duty he equally failed to discharge. At the trial the appellant abandoned the allegation of bad faith contained in the statement of claim. The burden of proving negligence, the absence of reasonable care, on behalf of both parties rested on the appellant. It might possibly be sufficient to say, that even assuming the duties alleged and relied upon existed, which I am far from admitting, there is not, in my view, sufficient evidence to show that either of the respondents neglected to perform fully the duty he was alleged to owe to the appellant. There was, therefore, in my opinion, no evidence of negligence to go to the jury upon which they as reasonable men could find for the appellant in either case, and if that be so the respondents were entitled to have a verdict directed for them at the trial. This is well established to be the law.

My Lords, the question whether there is in either case such a lack of evidence in support of the plaintiff's case as entitles the defendant to have a verdict directed for him is a question of law, to be ruled on by the presiding judge, and should, like every other question of law, be determined on legal

(1) 56 J. P. 212.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

principles, unaffected by feelings of sympathy or pity. Equally, the provisions of a statute should be construed according to legal principles, sentimental feelings being entirely suppressed.

The appellant's case, in my opinion, fails upon the point I have mentioned, however the other questions raised should be decided. I gather from a passage in Atkin L.J.'s judgment that if he had come to the conclusion that a justice of the peace, when acting under s. 16 of the Lunacy Act of 1890, was acting as a judge and not merely as an administrator, he would have decided the appeal in favour of the respondent Griffiths. I assume that, by acting as a judge, he meant doing a judicial act. My Lords, it appears to me to be absolutely plain that the respondent Griffiths, in ordering and directing, on the materials in that section mentioned, that the appellant, who he was satisfied was a lunatic, should be received and detained in Colney Hatch, was adjudicating on a vital right and interest of the appellant —his right to liberty. A proceeding may be, and has often been, decided to be a judicial proceeding though the person conducting it is not a Superior Court judge nor an Inferior Court judge nor even a justice of the peace. Neither is it necessary to make it a judicial proceeding that the persons conducting it should have power to compel the attendance of witnesses or to examine witnesses on oath ; nor yet that in the proceedings the stately formalities which distinguish the proceedings of the Superior Courts of Justice should be to any extent imitated. Whether a proceeding is a judicial proceeding or merely an administrative proceeding depends much more on what is authorized to be done by the named authority : what is done, and the effect of the act upon the rights and interests of others. And it is, I think, well established that no person can be sued in an action such as the present for doing a judicial act if, in doing it, he acts honestly.

I know no better definition of a judicial act than that given by May C.J. in the Irish case of *Reg.* v. *Dublin Corporation.* (1)

(1) (1878) 2 L. R. Ir. 371, 376.

In that case the corporation by certain orders, directed (illegally it was alleged) that certain liabilities should be paid out of their borough fund. A certiorari was moved for to bring up these orders with a view to having them quashed as illegal. The Chief Justice said: "It is established that the writ of certiorari does not lie to remove an order merely ministerial; . . . . but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

This decision was followed in another Irish case—namely, *Reg.* v. *Local Government Board.* (1) The Irish Local Government Act of 1898 (61 & 62 Vict. c. 37, s. 115), by sub-s. 18 of s. 115 provided that officers might be transferred from their existing positions to others, and that in case the duties of their new offices should be less or greater than those of the old, the Local Government Board should determine the remuneration the transferred officers were to receive having regard to this alteration. An order of the Local Government Board made under the powers thus conferred, fixing the remuneration payable to a transferred officer, was held to be a judicial act. In *Leeson* v. *General Medical Council* (2), the council were by s. 29 of the Medical Act, 1858 (21 & 22 Vict. c. 90), as amended by the 25 & 26 Vict. c. 91 and 49 & 50 Vict. c. 48, empowered, if any registered medical practitioner should be convicted of any of the crimes mentioned therein, or should after due inquiry be judged by them to have been guilty of infamous conduct in any professional respect, to direct their registrar, if they should think

(1) (1900) 34 Ir. L. T. 196. (2) 43 Ch. D. 366.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

fit, to erase the practitioner's name from the register. The misconduct charged in this case was that Leeson had acted as a cover for one Harness (an unqualified person) to enable the latter to carry on the business or profession of a medical electrician and to practise under the various aliases mentioned as if he was duly qualified. An inquiry was held by the council, several depositions were read, Leeson and Harness were examined, but not on oath, and the council held that Leeson was guilty of the conduct charged, that his offence was, in their opinion, infamous in a professional respect, and directed the registrar to erase his name from the medical register. The plaintiff Leeson then brought an action to restrain the council from removing his name from the register and from publishing the resolutions which they had passed with respect to his conduct, and moved for an injunction. A question was raised as to whether the proceedings before the council were not invalidated by reason of the interest of two members who took part in them, but this is immaterial for the purpose of the present case. Cotton L.J., in delivering judgment, said (1): "In my opinion it would be wrong to consider whether the General Medical Council arrived at a right conclusion on the evidence which was brought before them. The General Medical Council cannot, strictly speaking, take evidence. They cannot take evidence on oath. They cannot take evidence which we as lawyers have to consider as evidence. They have statements made before them in support of any complaint which is made, and also they have statements made on the other side by the medical man against whom the complaint is made, and if it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by sect. 29, then I think we ought not to look at the evidence or in any way consider whether they have arrived at a right conclusion. Of course, if it was alleged and proved before us that they had acted corruptly, if it was proved that there was no statement made before them on which they could reasonably and honestly arrive at the conclusion

(1) 43 Ch. D. 377, 379.

at which they did arrive, then I think we ought to consider it to see whether the fact that there was no statement which could justify the conclusion was such evidence as, if not displaced, would lead us to the conclusion that the Council had not acted honestly with respect to the charge brought before them, but had acted from some other motive." Again he said: "To my mind it is clear here that the General Medical Council, in respect of the complaint against Dr. Leeson, were acting judicially. They were not in the ordinary sense judges, but they had to decide judicially as to whether or not the complaint against Dr. Leeson was well founded; and they could, if they found it was well founded, make an order which would be of great importance to him and remove him from the register, with very serious consequences."

Bowen L.J., as he then was, said (1): "These proceedings were in the nature of judicial proceedings, although the forum is a domestic one, and although the evidence taken before such forum differs in many respects from evidence which is adduced in a Court of law, and in particular in the all important respect that it is not given upon oath. The only thing which the Courts can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction." Fry L.J. said (2): "I cannot for one moment yield to the argument which was addressed to us by leading counsel for the General Medical Council that they were not acting judicially in the performance of their duties on the occasion in question. The nature of the proceeding and the effect of the proceeding seem to me to be very strong to shew that it must be judicial, because the result was to deprive Dr. Leeson of rights which before that were vested in him as a duly qualified medical man on the register of the Council."

This description of Fry L.J.'s of a judicial act exactly corresponds with that given of it by May C.J. already quoted.

In *Ferguson* v. *Earl of Kinnoull* (3), the patron, Lord Kinnoull, presented to the Presbytery, in the case mentioned,

(1) 43 Ch. D. 383. (2) Ibid. 386. (3) 9 Cl. & F. 251, 260.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

a clergyman in order that they might give him a trial. They refused to do this, which was held to be a ministerial act, and it was contended that therefore they might be sued by the party injured. But the Lord Chancellor (Lord Lyndhurst) during the argument said, apparently with the concurrence of Lord Campbell: "I think we may take that principle for granted, that where a party has jurisdiction to do an act" (obviously meaning a judicial act) "no action will lie against him for doing it, unless malice is shown." And again he said: "If they (the Presbytery) had admitted that gentleman to his trial, and after taking him upon trial had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it."

That distinction is again and again pointed out throughout the lengthy judgments which were delivered in this House in that case by Lord Lyndhurst and others. In not a single one of the cases already cited was the body or tribunal which was held to have acted judicially composed of judges of the Superior Court or judges of any other kind of Court, nor were they even composed of justices of the peace. To none of them was power given either to summon witnesses before them or to take evidence upon oath. In none of them were the formalities of the proceedings of the higher Courts of Justice observed. The nature and character of their action was determined by the nature and character of the jurisdiction conferred upon them, the acts done in exercise of that jurisdiction, and the consequences to third parties resulting therefrom. There is not a suggestion to be found in the reports of these cases that they owed any duty to those affected by their action to exercise the jurisdiction conferred upon them with reasonable care. They found their protection in the honesty with which they exercised their jurisdiction, and in that alone. I concur with the Court of Appeal in thinking that s. 25 of the Lunacy Act of 1891 must be read as meaning that the same consequences must follow from the making of an order such as Griffiths made in this case, both

as regards the person making it and the person against whom it is made, as if the order had been made by a justice of the peace acting under the Act of 1890 ; but even if this were not so, and if Griffiths was not in the position of such a justice, the cases already cited show that the making of this order was an authorized judicial act, and that he would, if he acted honestly, be protected from actions such as the present.

The proceedings authorized by the first twenty sections of the Lunacy Act of 1890 do not resemble in character or effect proceedings on inquisition. These latter are dealt with by the ninetieth and fifty four following sections of the statute. The orders under ss. 16 and 20 are made in the interest at once of the alleged lunatic and of the public. They afford, to use Lord Denman's words in *Shuttleworth's Case* (1), a protection "against improper confinement and against danger from a lunatic being unrestrained."

Lindley L.J. (*Reg.* v. *Whitfield* (2)), when speaking of the Lunacy Act of 1853, said : "The object of the statute is not to enable Justices to adjudicate a person to be non compos mentis, but to enable them to place under proper care and control persons whom they are satisfied are lunatic and require to be so placed. They have to act in cases of emergency and of great danger, as well as in other cases ; their measures are precautionary measures only ; if they make a mistake, it can soon be corrected : see s. 79." The provisions of this Act of 1853 and of that of 1890 are in this respect different from the provision of 8 & 9 Vict. c. 100, s. 99, the statute under consideration in the case of *Fletcher* v. *Fletcher* (3), so much relied on by the appellant. That was an action for assault and false imprisonment brought by the person who had been ordered to be detained as a lunatic. The defendant's plea did not allege that at the time the plaintiff was imprisoned he was a lunatic but only that he conducted himself as a person of unsound mind and incapable of taking care of himself. On demurrer to this plea it was held to be bad on the ground (1.) that at common law no

(1) (1846) 9 Q. B. 651, 658. (2) 15 Q. B. D. 122, 149.
(3) 1 E. & E. 420.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

person can legally imprison another on the ground of insanity unless he be able to show that the person who was so imprisoned was actually insane at the time, and (2.) that the statute law, though it protected duly authorized persons acting under the certificates and orders, did not protect the person by whom the order was made, in that case the defendant. The procedure available against a sane person as a precautionary measure to protect others from being assailed by him is to compel him to enter into recognizances in a sum named with sureties in sums also named to keep the peace and be of good behaviour to all His Majesty's subjects for a given time, or in default to be imprisoned for a time specified. This is preventive justice. It, according to Blackstone, Book 4, c. 18, "consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties . . . . must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. . . . . The caution . . . . is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension." This clear statement of the law has been many times approved of and acted upon. It is only necessary to cite *Reg.* v. *Cork Justices* (1), and *Wise* v. *Dunning* (2). It is obvious that this procedure is directed to secure the public from the probable aggression of the sane, just as reception orders under ss. 6, 16 and 20 are directed to secure the public against the possible aggression of those who through insaneness of mind are incapable of self-control. But the taking of bail by a justice of the peace is a judicial act: *Linford* v. *Fitzroy*. (3)

(1) (1882) 15 Cox C. C. 78, 84. 149. (2) [1902] 1 K. B. 167, 175.
(3) 13 Q. B. 240, 247.

The refusal of a justice to admit a misdemeanant to bail where adequate bail is tendered is a misdemeanour, and yet Lord Denman C.J., Coleridge, Wightman and Erle JJ., decided in this case, where such bail was refused, that the admitting to bail by a justice was "essentially a judicial duty, involving inquiries on which discretion must be exercised, and, in some cases of misdemeanour, discretion under circumstances of much nicety," and that they could not lay down a rule which is to depend upon the peculiar facts of each case: that the broad rule of distinction was this: "That, unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in execution of that duty, unless he can be fixed with malice." This decision is not affected by the provisions of the Bail Act of 1898 (61 & 62 Vict. c. 7). To appreciate the significance of this decision one has to bear in mind what is the technical effect of a man's entering into bail with sureties.

The effect is to place the person who is admitted to bail in the custody of his sureties, who may re-seize him if they have reason to suppose that he is about to fly, and bring him before a justice, who will commit him to prison in discharge of the bail. If he should be in the custody of the law when he is admitted to bail he is released from that custody and given into the custody of his sureties: 2 Hale, p. 124; Dalton, c. 166; *Foxhall* v. *Barnett.* (1)

Atkin L.J. had apparently no difficulty in holding that a proceeding authorized by s. 6 is a judicial proceeding. For the purpose of comparing it with the proceedings authorized by s. 16 he takes it almost as a model and finds it has all the indicia of a judicial proceeding. Notwithstanding the unfeigned respect which I feel for all his judicial pronouncements, I am entirely unable to agree with him in this. If the two sections be compared I think it will be found that, though they differ in some respects, owing mainly to the difference in the positions of the persons with whom they respectively deal, the core and substance of each of the two

(1) (1853) 23 L. J. (Q. B.) 7.

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

is in nature and effect practically the same. The proceedings under s. 6 are very much a family affair. The petitioner who institutes them is, wherever possible, to be the husband or wife of the alleged lunatic. The petitioner must undertake in the petition to visit the alleged lunatic, either personally or by some representative appointed by him or her, once in every six months. Sect. 16 deals with unfortunates who are not the objects of such care or interest—namely, paupers alleged to be lunatics, or alleged lunatics wandering at large. No friend or relative procures the machinery of s. 16 to be set in motion in their interest. They are brought before the justice by public officials, and, if committed to an asylum at all, are so committed in order that the public may be protected from them, and that they may be protected from themselves. But it is contended that there is one feature which distinguishes fundamentally the proceeding under s. 6 from those under s. 16, and stamps the former in contrast to the latter with a judicial character. It is this: The person who hears the petition under s. 6 is "a judicial authority," while the person who presides over the proceedings instituted under s. 16 is a mere justice of the peace. Well, there is often something in a name; but, in this connection, there is not much that is helpful, for when one refers to s. 9 it will be found that this "judicial authority" is either a justice appointed by his brother justices, or a magistrate having jurisdiction in the place where the lunatic is, and nothing more. The justice of the peace mentioned in s. 16 would in most cases, I should think, be one of the latter class. No doubt s. 9 provides that a county court judge may be "a judicial authority," but it does not appear to me that that fact by itself raises the judicial status of his magisterial associates, or tends to stamp the proceedings with a judicial character.

It was urged upon the House most persistently by the appellant that natural justice imperatively required that in any proceedings of a judicial character the party against whom the proceedings were directed, and whose rights they affected should be present and have an opportunity of being heard. There is much truth in that. But in the model

proceedings under s. 6 the judicial authority may neither see nor examine the alleged lunatic nor give him an opportunity of being heard unless he thinks it necessary so to do, whereas, under s. 16, the justice is bound to examine the alleged lunatic, thereby giving him an opportunity of being heard, and also bound to make such other inquiries as he may think advisable. In the present case the appellant was examined at length by the respondent Griffiths, and, in my view, got an ample opportunity of defending himself. By s. 4 it is provided that the petition mentioned in s. 6 shall be accompanied by a statement of particulars (in Form 2) and by two medical certificates each in Form 8. As to the statement of particulars, it is the same in all respects as that attached to the reception order made under s. 16 in Form 12. The "judicial authority" is no doubt furnished with two medical certificates, the justice acting under s. 16 furnished with only one; but there is this marked difference between them. Those mentioned in s. 6 are procured from medical men, presumably employed and paid by the persons who initiate the proceedings; that prescribed by s. 16 is procured from an independent medical practitioner called in by the presiding justice to assist him. All the certificates are to be in the same form, namely Form 8, and subserve the same purpose, namely, they, in conformity with the provisions of s. 28, sub-s. 8, supply evidence of lunacy. That is their function. Neither the "judicial authority" nor the justices acting under s. 16 are bound to accept and act upon these certificates as conclusive evidence of fact. The justice, in addition to examining the alleged lunatic, may, as I have already pointed out, make such further inquiries as he thinks advisable. In the present case he examined witnesses on oath, one of whom was the appellant's own mother, and it is by this examination of the alleged lunatic, coupled with the other proof he may obtain, that he is to be satisfied that the person whose case is under his consideration is an alleged lunatic and a proper person to be detained. If he is satisfied on these two points he is to make the order directing that the alleged lunatic should be received and detained in the institution for lunatics named in

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Atkinson.

the order. If he is not satisfied of them he is bound not to make the order. The judicial authority acting under s. 6 must have the two medical certificates before him just as the justice acting under s. 16 must have the single certificate before him. The judicial authority is bound to consider the allegations in the petition and statement of particulars and the evidence of lunacy appearing by the medical certificates, and, as I have already pointed out, may, if he should think it necessary, see and examine the alleged lunatic himself, and if he, on these materials, should be satisfied that a reception order may properly be made he should forthwith make it, or if not so satisfied he must appoint as early a day as practicable, not being more than seven days after the presentation of the petition for the consideration of it, and may make such further and other inquiries concerning the alleged lunatic as he may think fit, just as the justice acting under s. 16 may make such further inquiries as he thinks desirable. At the time thus appointed for the consideration of the petition the judicial authority may make an order thereon or dismiss it or adjourn the consideration of it for further evidence or information. The character of people dealt with under s. 16 does not well permit of adjournments of this kind, but I absolutely fail to see in what respect the two proceedings are not in essence practically identical in character. In each the act to be done, i.e., the making of the order is, to use May C.J.'s words (1), "done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others." If the proceedings under s. 6 be of a judicial character as I think they are, I am clearly of opinion that those under s. 16 are necessarily of the same character. The use of the word "satisfied" cannot indicate any difference between them as it is used in both sections. Not only is it not proved that the respondent Griffiths acted dishonestly or maliciously in conducting the proceedings which he had under s. 16 jurisdiction to conduct or making the reception order, dated the 25th of March, 1918, but his good faith in the whole transaction is admitted. That being so, the authorities,

(1) 2 L. R. Ir. 377.

I think, clearly establish that no action such as the present can be sustained against him. I do not express any opinion upon the question whether a justice acting within his jurisdiction may not have a further protection than that above mentioned approaching somewhat in character to the absolute privilege enjoyed by judges of the Superior Courts. The appeal, in my opinion, completely fails. The judgment of the Court of Appeal was, in my view, right and should be affirmed, and the appeal be dismissed.

LORD MOULTON. My Lords, this action is brought by the plaintiff in respect of his being sent to Colney Hatch Asylum and there detained for a few days under and by virtue of a reception order made under the provisions of the Lunacy Act, 1890, s. 16, by the defendant Griffiths, who was a person duly authorized to make such orders by the Lunacy Act, 1891.

The Lunacy Acts deal with one of the most difficult subjects that can come before the Legislature. On the one hand it has to protect the individual from the grave peril of the loss of his liberty if a mistake is made as to his mental condition and he is wrongly adjudged to be a lunatic, and on the other hand it has to protect the community from the dangers that would follow from allowing lunatics to go about freely among their fellow men. The Lunacy Acts represent the course that the Legislature has decided upon in view of these rival dangers, and one cannot read them without feeling that the framers of those Acts have striven throughout to safeguard, as far as possible, both the individual and the community. But the way in which this is to be done is a matter for the Legislature and not for the Courts of Law. Our duty is loyally to see that those laws are followed, and not to allow ourselves to be turned aside from this our plain duty by arguments as to whether their provisions might wisely be altered in either direction, still less to be influenced by appeals to our feelings by suggestions that they may bear hardly on the individual or the community in any particular case.

The cause of action for which the plaintiff seeks damages in the present case is not very precisely defined in the pleadings

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Moulton.

(which naturally do not follow the ordinary legal forms by reason of the fact that the plaintiff has conducted his case in person throughout all its stages), but it is substantially an action for false imprisonment against both defendants, and also against the defendant Anklesaria an action for wrongfully certifying him as a lunatic. There is no ground for suggesting that either defendant acted without jurisdiction, and, indeed, no such suggestion was seriously made. The real ground of action is that the defendants were guilty of negligence and want of skill and care in performing the duties which they had to perform in carrying out the provisions of the Acts. It is true that at one part of the argument of the plaintiff, it was suggested that he was not a pauper lunatic to whom the provisions of s. 20 of the Lunacy Act applied, but he formally abstained from pressing the objection and in my opinion it was wholly unsustainable.

The facts of the case can be stated very shortly. At the time that proceedings were taken against him as a lunatic, the plaintiff was residing with his parents, and undeniably acted in a way which caused them to regard him as such. Among other acts which gave rise to that belief on their part, it is admitted that he struck his mother and tore down the curtains and stamped on them. She thereupon called in a policeman to take charge of him as a lunatic under the provisions of s. 20 of the Lunacy Act, 1890. The policeman originally called in was Francis Crookes. He saw the plaintiff, and from his behaviour he came to the conclusion that he was in fact a lunatic, but for greater caution he called in his superior officer, Police Inspector Owen. He took the same view, and accordingly sent the plaintiff to the infirmary, giving to the master of the infirmary an order to take him in. This was done under the powers given to the police by s. 20 of the Act, and no complaint is made of the action of Inspector Owen in giving such order or on its being acted on.

By the provisions of s. 20 such detention can only last for three days, during which time the police must take further proceedings under the Act. These proceedings consisted in this case in bringing him before the defendant Griffiths,

acting under the powers of s. 16 of the Act, for the purpose of obtaining a reception order, which would authorize his removal (if adjudged to be a lunatic) to an institution for lunatics named in the order and his detention there. This proceeding was undoubtedly the correct one, and the jurisdiction of the defendant Griffiths (who was a person authorized in writing by the Lord Chancellor to sign such reception orders under the provisions of s. 25 of the Lunacy Act, 1891) to exercise the powers of a justice under s. 16 of the Lunacy Act, 1890, is undeniable. These proceedings resulted in the making of the reception order complained of.

The cause of action therefore, depends exclusively on the provisions of s. 16 of the Act of 1890, and on that account I think it necessary to quote it in extenso. [His Lordship read the section.]

The defendant Anklesaria, who was the medical officer of the infirmary, was called in by the defendant Griffiths as the medical practitioner required by the provisions of the section, and he attended throughout the inquiry. The evidence of the policeman, Francis Crookes, was first taken. The mother was then called, and gave her evidence. Finally, the plaintiff was examined by the defendant Griffiths. At the conclusion of the inquiry the defendant Griffiths made the reception order (which he duly signed the next morning), and the plaintiff was removed to Colney Hatch Asylum as provided in the order.

Now, it must be borne in mind that no charge of bad faith or malice is made against either of the defendants, nor was there a scintilla of evidence adduced at the trial on which any such charge could be founded. Both the defendants must therefore be taken to have acted in good faith throughout. So far as the defendant Griffiths is concerned, I am of opinion that this puts an end to the action. If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision

H. L. (E.) 1921 EVERETT v. GRIFFITHS. Lord Moulton.

in the discharge of his duty to the public and then to leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision. In the opinion of some of the noble Lords whose opinions have been already given this is expressed by saying that you cannot attack a man for doing a judicial act without alleging and proving malice or mala fides. I wish to avoid the use of the words "judicial act," not because I think them unsuitable, but because there are varying degrees of protection given in respect of the performance of judicial acts according to the judicial position of the person performing them, and I wish to avoid any discussion as to matters of this kind and to rest my judgment directly upon what I believe to be the universal rule applicable in all cases, which is that which I have stated above.

The law may of course affix conditions as to the exercise of any such public duty. It may provide, as in this case, that the assistance and certificate of a medical practitioner must be obtained and that the justice must himself examine the person affected by the decision. If the Legislature so provides it is clear that the justice or other public officer exercising the jurisdiction must comply with the conditions if he is to bring himself within the protection. But here there is, in my opinion, no question of the defendant Griffiths having complied with all the conditions laid down in the section. The decision as to what inquiries are advisable rests with him, and in the present case we find that he took the evidence of the policeman and the plaintiff's mother, who is admitted to have been very fond of the plaintiff. He examined the plaintiff personally. It cannot be suggested, therefore, that he failed to perform the conditions laid down by the statute before making his decision. He is therefore entitled to protection in respect of that decision and its legal consequences, whether that decision was right or wrong in fact, because it was honestly arrived at in the discharge of his duty. Even if an appeal had been given, and the appeal tribunal had come to a different conclusion, this would not have changed in any way the protection given to him in respect of his

decision. It was his honest opinion that the plaintiff was a lunatic at the time and he was bound in his duty to the public to give effect to that opinion in his decision.

I turn now to the action against the defendant Anklesaria. The case against him is of a totally different nature from that against the defendant Griffiths, by reason of the fact that his connection with the inquiry leading up to the detention of the plaintiff was of a different character. He was called in as the medical practitioner required by the provisions of s. 16, and it was his duty to examine the plaintiff, and give a medical certificate as to whether he was a lunatic for the purpose of guiding and assisting the defendant Griffiths in arriving at his decision on the case. The plaintiff asserts that in so doing, he was guilty of negligence and want of reasonable care and skill. I propose to assume in the plaintiff's favour that such negligence and want of care and skill would give to the plaintiff a good cause of action against such defendant, though I do not decide the point. It is not necessary to do so in this case, because I agree with the rest of my noble friends that there was no evidence on which a jury could reasonably come to the conclusion that there was any such negligence or want of care and skill on the part of the defendant Anklesaria. The opinions that have been already given enter so fully into the details of this part of the case that it is not necessary to repeat the examination of them and I shall content myself with expressing my concurrence in those judgments.

I am of opinion, therefore, that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, March 7, 1921.

Solicitor for the appellant: *A. R. Lord.*
Solicitors for the respondents: *Samuel Price & Sons.*

[PRIVY COUNCIL.]

J. C.* 1921 Jan. 21.

HEMELRYCK . . . . . APPELLANT;

AND

WILLIAM LYALL SHIPBUILDING COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Practice—Writ—Service out of the Jurisdiction—"Contract to be performed within the jurisdiction"—Sale of Ships—Reasonable Evidence of a Contract—Refusal to take Delivery—Rules of Supreme Court, Order XI., *r.* 1 (*e*).

Under Order XI., r. 1 (*e*), of the Rules of the Supreme Court of British Columbia (which is in the same terms as the corresponding English rule) the Court or a judge has power to grant leave to serve notice of a writ of summons outside the jurisdiction when the action is for damages for breach of a contract if there is reasonable evidence of a concluded contract and a breach of a real and substantial term of it within the jurisdiction.

Upon the repudiation by the buyer under a contract for the sale of ships to be delivered within the jurisdiction but to be paid for outside the jurisdiction, the refusal to accept delivery is a breach of a real and substantial term.

Judgment of the Court of Appeal affirmed.

Johnson v. *Taylor Bros. & Co.* [1920] A. C. 144 distinguished.

APPEAL by special leave from a judgment of the Court of Appeal of British Columbia (April 6, 1920) dismissing an appeal from a judgment of the Supreme Court (Murphy J.), which dismissed a motion to set aside an Order in Chambers made by Hunter C. J. giving the respondents leave to issue a writ against the appellant and to serve notice of it upon him outside the jurisdiction—namely, in Paris.

The appellant and the respondents, who carried on business at Vancouver in British Columbia, conducted negotiations by letters and cablegrams for the purchase by the appellant from the respondents of six auxiliary sailing ships. On November 7, 1918, the parties signed a formal contract in duplicate whereby it was provided that the ships were to be

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, and LORD SHAW.

delivered afloat at Vancouver upon receipt of the payments therein set forth. The provisions with regard to payment were that half the agreed price was to be paid upon the signing and delivery of the contract (which purported to acknowledge the receipt) and the balance upon delivery of the ships; it was further stipulated that all payments should be made to a named bank in New York. The contract in duplicate was forwarded to the bank in a letter signed by the parties jointly, with instructions that one of the duplicates was to be delivered to each party upon the bank receiving from the appellant for the account of the respondents half the purchase price. Disputes afterwards arose with regard to the time of payment and the appellant refused to proceed with the matter. The respondents thereupon commenced the present action, the proceedings in which are stated above.

Special leave to appeal was granted.

1921. Jan. 21. *Hon. Sir M. Macnaghten K.C.* and *G. Lawrence* for the appellant.

Barrington-Ward K.C. and *Horace Douglas* for the respondents.

The arguments sufficiently appear from the judgment of their Lordships.

The judgment of their Lordships was delivered by

LORD BUCKMASTER. On March 20, 1919, the respondents obtained leave ex parte from the Chief Justice of the Supreme Court of British Columbia to issue and serve against the appellant out of the jurisdiction notice of a writ claiming damages for breach of a contract alleged to have been entered into by them with the appellant for the sale and delivery to him of six sailing vessels.

The appellant moved to rescind the order, but his application was dismissed by Murphy J., on appeal to the Court of Appeal of British Columbia this order was confirmed, and from that judgment by special leave this appeal has been brought. A question arose in the course of these proceedings whether an application by the appellant for leave to cross-examine

J. C. 1921

HEMELRYCK v. WILLIAM LYALL SHIPBUILDING CO.

amounted to a submission to the jurisdiction, but this point need not be considered, as for other reasons their Lordships think that this appeal must fail.

The rule which permits service out of the jurisdiction in British Columbia is the same as that which exists in this country, and the relevant part of that rule provides that leave to effect such service may be granted when the action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction.

The appellant objects in the present case that there is in fact no contract as between himself and the respondents, and, further, that if such contract exists there has been no breach within the jurisdiction of any of its terms.

With regard to the first matter the difficulty arises in this way. Cablegrams and correspondence passed between the parties during the months from July to October, 1918, as to terms for the purchase by the appellant of the six sailing vessels, and ultimately, when an agreement appeared to have been reached, a document was drawn up dated November 7, 1918, putting into full and formal language the arrangements to which the parties ultimately agreed. This document, the appellant states, was delivered as an escrow, and the appellant contends that as the conditions upon which delivery was to be made complete have never in fact been satisfied, he is not liable under its terms. That may be true, but in that event it might, none the less, be also true that he was liable under the previous correspondence and cablegrams which had led up to the making of that contract.

So far as the Courts in British Columbia are concerned the learned judges in the Court of Appeal at least appear to have assumed that the question whether or no there was a contract was one which had not been strenuously argued before them. Counsel for the appellant, however, say that this statement must have been due to some misapprehension. Their Lordships only refer to the matter for the purpose of making clear that they do not intend by the opinion which they express to prejudice in any way the right of the appellant

to urge at the hearing of these proceedings that in fact no contract existed between himself and the respondents at all. For the purpose, however, of enabling the discretion which is conferred by the rules to be exercised, it is sufficient if there appears reasonable evidence that a contract has been made, unless, indeed, the defendant is in a position to satisfy the Court that such evidence should be disregarded and that in fact there was no contract at all. Their Lordships think in the present case that there is sufficient evidence of a contract, to found the jurisdiction, although they do not intend to exclude the appellant from trying to show at the hearing that no contract in fact exists.

The remaining question is whether, assuming there be a contract, it ought to be performed within the jurisdiction according to its terms. On this point it is well settled that for the purpose of satisfying the rule it is sufficient if there be in fact one term that has to be performed within the jurisdiction; but, as was recently pointed out in the case to which reference has been made in the judgment of McPhillips J., *Johnson* v. *Taylor Bros. & Co.* (1), that principle cannot be invoked for the purpose of using an artificial cause of action in order to found jurisdiction when the real right of action would be somewhere else.

But even on this assumption there still remained the breach due to refusal to accept the ships, which, though it would follow in sequence the payment of the money, was a real and substantial breach of the contract sufficient to satisfy the rule.

The argument, however, that has been urged in support of the appeal is that here the real breach is non-payment of the money, and that non-payment of the money was a breach that must have taken place, at any rate according to the terms of the formal document, in New York, and that it was that precedent breach that really gave rise to these proceedings. If, however, this document be, as the appellant contends, inoperative, there remains the question as to the contract created by the correspondence, which contains no express condition making payment of the balance of the purchase

(1) [1920] A, C. 144.

J. C. 1921 HEMELRYCK v. WILLIAM LYALL SHIPBUILDING CO.

money a condition precedent to the delivery of the vessels, nor is there any express term as to the place where the balance of the purchase money is to be paid. In the result the appellant has declined to be bound by the contract, and it results that he has refused to accept the vessels which were to be delivered at Vancouver. This refusal is a real and substantial cause of action and satisfies the conditions of the rule.

For these reasons their Lordships think this appeal must fail and should be dismissed with costs. They will humbly advise His Majesty accordingly. The time for entering appearance in the action will be extended to six weeks from to-day.

Solicitors for appellant: *Linklaters & Paines.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1921 *Feb.* 11.

DESPATIE . . . . . APPELLANT;

AND

TREMBLAY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC.

Canada (Quebec)—Marriage—Impediment to Marriage—Relationship—Roman Catholics—Rule of Roman Catholic Church—Impediment not specified in Civil Code—Civil Code of Quebec, art. 127.

The Civil Code of Quebec, by arts. 124, 125 and 126, expressly prohibits marriage between persons who are related to one another as therein specified, and by art. 127 provides: "The other impediments recognized according to the different religious pursuasions as resulting from relationship, or affinity, or from other causes, remain subject (restent soumis) to the rules hitherto followed in the different churches and religious communities."

In 1904 the appellant and respondent, who were Roman Catholics, were married to one another in a Roman Catholic Church in Quebec.

---

* *Present:* LORD BIRKENHEAD L.C., VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, and LORD MOULTON.

In 1910, upon an application by the respondent, the husband, the Roman Catholic Bishop of the diocese decreed that the marriage was null and void on the ground that the parties being cousins of the fourth degree their marriage without a dispensation was contrary to a rule of the Roman Catholic Church. The relationship of the parties was not an impediment specified by the Code. The husband brought an action in the Superior Court and obtained a declaration that the marriage was null and void; that decision was based upon the ecclesiastical rule above mentioned and art. 127 of the Code:—

Held, that the marriage was valid, since art. 127 did not alter the law, and immediately before the passing of the Code no ecclesiastical authority had power to prohibit parties from contracting the civil status of marriage.

Art. 127 has no bearing upon any inherent incapacity of the parties to contract a valid marriage, but only preserves the right of each religious communion to recognize the impediments which exist according to its faith, and justifies the refusal of a minister of that communion to solemnize any marriage which offends against its rules.

Judgment of the Superior Court reversed.

APPEAL by special leave from a judgment of the Superior Court of Quebec, in Review (November 29, 1912), affirming a judgment of the Superior Court for the District of Richelieu (June 26, 1911).

On May 6, 1910, the respondent commenced an action in the Superior Court against the appellant, his wife, for a declaration that their marriage was null and void.

The facts are stated at the commencement of the judgment of their Lordships.

The trial judge (Bruneau J.), by his judgment, reported at Q. R. 40 S. C. 429, made a declaration as prayed. Upon an appeal to the Court sitting in Review, that Court (Tellier and De Lorimier JJ.; Archibald J. dissenting) affirmed the judgment. The proceedings in review are reported at Q. R. 43 S. C. 59.

Special leave to appeal to His Majesty in Council was granted.

The appeal was originally argued in May, 1914, and was ordered to be reargued for the reason stated in the judgment of their Lordships.

1920. July 26, 27, 29. *Wainwright K.C.* and *M. Alexander* for the appellant. The appeal depends upon the provisions

J. C. 1921 DESPATIE v. TREMBLAY.

of the Civil Code: *Robinson* v. *Canadian Pacific Ry. Co.* (1) The Civil Code deals with the whole subject of marriage, and is modelled closely on the Code Napoleon, art. 127 being added; like that Code it treats of marriage as a civil contract. Even in the case of an express prohibition, a power to annul a marriage contravening it is not to be implied: *Catterall* v. *Sweetman* (2); and any provision in restriction of marriage is to be strictly construed: *Hodgkinson* v. *Wilkie.* (3) The Civil Code contains no provision for annulling marriages to which art. 127 applies, although there are provisions relating to the annulling of marriages offending against the impediments expressly mentioned in the Code. If art. 127 has the effect contended for, it would equally apply in the case of a rule of the Jewish, or of any other non-Christian, religious body. The article does not enable any ecclesiastical authority to annul as a civil contract a marriage validly solemnized according to the Code: *Hébert* v. *Clouâtre.* (4) The article declares that the impediments to which it refers are to remain subject to the existing rules. But it has not been shown that ecclesiastical rules ever had in Canada any bearing on the civil contract, save so far as the civil power declared that they had. If art. 127 has the effect contended for it would be contrary to 32 Hen. 8, c. 38, and unconstitutional. There never obtained in Canada a union between civil and ecclesiastical rule: *Languedoc* v. *Laviolette.* (5)

[Reference was also made to *Delpit* v. *Coté.* (6)]

St. Germain K.C. and *Errington* for the respondent. Before the cession of Canada impediments according to the rules of the Roman Catholic Church were not merely ecclesiastical impediments but were impediments to a civil contract. By edicts of 1606 and 1695 the rules of the Church were adopted in France as part of French civil law: Pothier Traité de Mariage, paras. 12, 19, 20, 443, 452. They were consequently part of the law of Quebec at the cession, and

(1) [1892] A. C. 481, 487.
(2) (1845) 1 Rob. E. 304.
(3) (1795) 1 Hagg. Con. 262.
(4) (1912) Q. R. 41 S. C. 249.
(5) (1857) 1 Low. Can. Jur. 240, 242; (1858) 8 Low. Can. Rep. 257.
(6) (1901) Q. R. 20 S. C. 338.

remained in force by virtue of the British North America (Quebec) Act, 1774, ss. 3, 4, 8, 17. The position in England was formerly so: see per Lord Lyndhurst in *Reg.* v. *Millis*. (1) During the period between the cession and the passing of the Code the Canadian Courts referred cases of nullity between Roman Catholic parties to the Bishop: *Lussier* v. *Archambault* (2); *Vaillancourt* v. *Lafontaine* (3); *Mignault* v. *Hapeman*. (4) This shows clearly that during that period the rules of the Roman Catholic Church, so far as they related to impediments between Roman Catholic spouses, were part of the civil law of the country. Further, although it was thought necessary to pass statutes of Lower Canada (44 Geo. 3, c. 2, and 1 Geo. 4, c. 19) validating marriages solemnized by ministers of certain Protestant communities, no such statutes were passed with regard to marriages solemnized by Roman Catholic priests, or by ordained ministers of the Church of England. Nothing altering the position with regard to impediments is to be found in the Consolidated Statutes, 1861, c. 20. Art. 127 of the Civil Code, by its terms continued as part of the civil law the rules of each religious community with regard to impediments arising from relationship or affinity. No argument can be based upon the absence of provisions in Ch. IV. as to the annulling of marriages offending against these rules, for there are no such provisions as to the impediments expressly declared in arts. 115 and 118. Although the present question was not dealt with by the Judicial Committee in the appeal heard in 1912 in the reference with regard to the marriage legislation, a passage in the judgment of the Supreme Court supports the respondent's contention: see *In re Marriage Laws Reference* (5); so also do the following Canadian decisions: *Hébert* v. *Clouâtre* (6); *Globensky* v. *Wilson* (7); *Lorange* v. *Lauzon* (8); *Durocher* v. *Degré*. (9)

[Reference was also made to the following additional paragraphs of Pothier's Traité de Mariage, paras. 91, 135–138,

(1) (1844) 10 Cl. & F. 534, 884.
(2) (1848) 11 Low. Can. Jur. 53.
(3) (1866) 11 Low. Can. Jur. 305.
(4) (1866) 10 Low. Can. Jur. 137.
(5) (1912) 46 Can. S. C. R. 132, 362.
(6) Q. R. 41 S. C. 249.
(7) (1886) Mon. L. R. 2 S. C. 147.
(8) (1912) 18 Rév. de Jur. 407.
(9) (1901) Q. R. 20 S. C. 456.

J. C. 1921 DESPATIE v. TREMBLAY.

141–147, 149; *Brown* v. *Curé de Montréal* (1); Beaubien, Lois Civiles du Bas Canada (1832), pp. 31, 41, and (with regard to the position of Jews) to *Ruding* v. *Smith* (2).]

Wainwright K.C., in replying, referred to Dalloz, Jur. Gén., s.v. "Mariage," vol. i., art. 34.

1921. Feb. 11. The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from a decision of the Superior Court of the Province of Quebec, sitting in Review, confirming with a slight modification the decision of the Superior Court, and it directly raises a point of great importance relating to the marriage laws of that Province.

The facts of the case are not in dispute and are as follows: The appellant and the respondent were married on October 25, 1904, in the Roman Catholic Church of St. Victoire, Richelieu, Quebec. Both parties are and were at the time of the marriage members of the Roman Catholic Church. They were married by their own curé, and all the formalities required by the laws of the Province of Quebec relating to the solemnization of marriage were observed. After the solemnization of the marriage the parties lived together as man and wife for some time and no question was raised as to the validity of the marriage until the year 1910, when the respondent, the husband, made an application to the Roman Catholic Bishop of the diocese to have the marriage declared null and void on the ground of the relationship of the parties.

By that date it had been discovered that the parties are cousins in the fourth degree (ascertained in the ecclesiastical manner) through common ancestors who were married in the year 1781, and who were the great-great-grandparents of the parties. Neither party knew of the relationship at the time of the marriage, which was made in all good faith in the belief that no relationship existed between the parties. In his application to the Roman Catholic Bishop of the Diocese to have the marriage declared null and void on the ground of the relationship of the parties, the respondent alleged a

(1) (1874) L. R. 6 P. C. 157. (2) (1821) Hagg. Con. 371, 385.

rule of the Roman Catholic Church enacted at the Council of Lateran in the year 1215 which forbade the marriage of Catholics related as cousins in the fourth degree unless a dispensation should be first obtained. It is admitted that no dispensation was in this case granted, or even applied for, by reason of the fact that the parties were entirely ignorant that the relationship existed until a considerable time after the marriage had been solemnized and consummated.

Such is the subject-matter of the suit and such are the essential facts. It is, however, advisable to state shortly the steps that have been taken in this litigation which are of a nature to raise important questions of procedure.

On February 11, 1910, the Roman Catholic Bishop of the diocese issued on the application of the respondent what purported to be a decree declaring the marriage null and void because of the said relationship. In May of the same year the respondent took action in the Superior Court against the appellant claiming a declaration that the marriage was null and void. He based his action solely on the existence of the relationship and the decree of the Roman Catholic Bishop. On these materials Bruneau J., the judge in the Superior Court, declared the marriage null and void.

On appeal by the present appellant the Court of Review set aside this judgment and remitted the case back to the Superior Court for proof of the facts and of the rules of the Roman Catholic Church. The case was accordingly reheard by Bruneau J., who heard evidence on these points and gave a judgment to the same effect as his previous judgment. On appeal to the Court of Review that judgment was upheld by a majority, Tellier and De Lorimier JJ. being in favour of supporting the judgment of Bruneau J. and Archibald J. being of a contrary opinion. From this judgment of the Court of Review the present appeal is brought by special leave granted on August 12, 1913.

The appeal first came before this Board in May, 1914. The judgment of the learned judges of the Court below, in favour of the respondent, had been practically based on their interpretation of art. 127 of the Civil Code and the same

J. C. 1921 DESPATIE v. TREMBLAY.

remark applies to the authorities quoted in support of their contentions by either party in the argument before this Board.

The material part of art. 127 reads as follows: "The other impediments recognized according to the different religious persuasions as resulting from relationship, or affinity, or from other causes, remain subject (restent soumis) to the rules hitherto followed in the different Churches and religious communities."

This article was treated by the judges as laying down the law with regard to marriage in a positive form and therefore as being decisive of the question at issue in the case. But on January 23, 1915, this Board pointed out to the parties that there was a view of the proper interpretation of the language of art. 127 which required examination and decision before that article could be treated as having the above effect. On that occasion their Lordships said: "It may well be argued that the intention of art. 127 was to make no change in the marriage law so far as the various religious communities are concerned, but to leave it in the same position as it was before the passing of the Code. In other words, that the effect of art. 127 is to leave the marriage law in these respects uncodified and not to create a new marriage law based entirely on the Code."

In view of the great importance to the community of the issues raised in the case, and of the fact that this question had not been substantially dealt with in the argument, their Lordships directed that the appeal should be reargued, adding: "If it should be held that the intention and meaning of art. 127 is that the marriage law in these respects should be unchanged, the case will necessarily require to be decided as it would have been prior to the passing of the Code, and it will be necessary to discuss the law as it then existed." In consequence of the above directions of their Lordships the case has been fully reargued and it remains for their Lordships to give judgment on the whole question.

Further consideration of the language of art. 127 of the Civil Code has confirmed their Lordships in the view

adumbrated by them as above mentioned—namely, that the intention and effect of this article was to leave the law as to the effect of the impediments to which it refers entirely unchanged. It neither added to nor took away from the effect of these impediments. This is clearly indicated by the use of the word "remain" ("restent"). There is nothing in the article which points to any alteration in the nature or effect of the impediments to which it refers. On the contrary everything is left in the same condition as it was before the codification.

Art. 127 is an example of what frequently if not generally occurs in the process of forming into a code the laws of any country, either wholly or with regard to some specified subject matter. The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of the *Bank of England* v. *Vagliano Bros.* (1) has always been accepted as expressing the object of codification. In speaking of the Bills of Exchange Act, which codified this particular branch of the law, he says: "The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities."

It will be noted that Lord Herschell confines his principle to those points which are specifically dealt with by the law.

(1) [1891] A. C. 107, 140, 145.

J. C. 1921 DESPATIE v. TREMBLAY.

But it almost always happens that in codification there occur particular points where the codifiers find it impossible or for some reason undesirable to deal specifically with the matter, and they leave it to be decided by the law as it previously existed. They accordingly make no pronouncement on these points, so that there is no language in the code which can form a new departure which authoritatively replaces the law as it previously existed. Sometimes this may be done by mere omission to deal with the point, but it may also be done specifically, as for instance by saying that in that particular matter (or more generally that in matters not dealt with by the code) the previous law shall apply. But however it be done the essence is the same. It is a refusal to codify the law on the particular point—i.e., a refusal to substitute for the law as it existed previously a new and authoritative pronouncement which expresses the law that is to operate in the future. Instead of formulating what the law should be in the future it says directly or by implication that it shall remain as it was in the past.

It is not necessary to refer to other cases of codification to substantiate these remarks. A remarkable instance of this mode of procedure occurs in the Code which their Lordships have here to consider. The Commissioners who were charged with the task of codification in dealing with the subject of "Civil Death" proposed that it should be a necessary consequence of perpetual religious vows as defined by them in the article they suggested. But the Legislature would not accept their suggestion, and the only article relating to the effect of religious vows stands in the Code as follows: "34. The disabilities which result as regards persons professing the Catholic religion from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved *remain subject to the laws by which they were governed at that period.*" In other words, the Legislature refused to set out in the Code the disabilities arising from such vows, but left them to be ascertained by the law as it existed at a particular date. The disabilities must

therefore be ascertained by a consideration of what was actually the law at that date, and cannot be ascertained from the Code itself. It happens that the date chosen is in that case the date of the cession, but the principle is the same whatever be the date chosen. It amounts to a refusal to codify on that particular point—i.e., to declare in the Code itself what is to be the law for the future—and leaves it to be decided by the law as it previously existed.

Their Lordships are of opinion that art. 127 of the Code is an example of a like procedure. In lieu of declaring specifically what is to be the law in the future as to the effect of the disabilities to which it refers, it simply expresses the intention to effect no change in the law as then existing on the matter and directs that it should remain unchanged. There is no word indicating an intention to define the impediments or to classify them or to give any new legal effect to any one of them. The dominant word in the article is "remain" ("restent"), which indicates clearly that the codifiers intended, while leaving the rules obtaining in the various religious communities to have their existing effect as rules of faith and conscience, to make no change in this portion of the law. "As they were so shall they remain" is its decision. The reason is not difficult to seek. By this date there were numerous religious communities of very various types in Quebec, and it would have been a thorny subject to deal with their religious tenets and give to them legal consequences by new and specific provisions. The only safe way was to leave the law as it stood, quite untouched.

If it were permissible to regard the intentions of the codifiers as expressed by their reports, their intention to leave the law unchanged would be equally evident, but this is a dangerous and doubtful proceeding and their Lordships decline to adopt it. The proper course is to look at the article itself, and their Lordships are of opinion that the language used in art. 127 carries out this intention. It may well be that the Commissioners had each of them his own views as to what was the existing law, and it was open to them to express those views in the Code, so as to deal with the matter specifically

J. C. 1921 DESPATIE v. TREMBLAY.

and by so doing to invite the Legislature authoritatively to fix the law for the future according to those personal views, whether those views were right or wrong. But they did not elect to do this, and we cannot indulge in conjectures as to what would have been the result of such a course of action. We can only regard what is embodied in the language of the article, and inasmuch as all that is there embodied is that the law in these matters should remain unchanged, that is the only effect of the article.

It follows from the above considerations that art. 127 of the Code does not determine the case before their Lordships, and that so far as regards the matters with which that article is concerned each case must be decided as it would have been had the question arisen immediately prior to the passing of the Code, so that the decision must depend on the laws as they then existed. But this does not affect the rest of the Code, which is positive law, and after examining the laws as they then existed it may be necessary to examine the other provisions of the Code in order to see whether they throw light on the case and whether they affect the conclusions to be drawn from art. 127 considered by itself. The Code must be interpreted as a whole whatever be the form of a particular article.

The immediate result of this is to remove the dominant question in this case from the domain of speculation, and personal views on matters of fact, to the domain of positive law ascertainable by recognized principles of jurisprudence. The laws governing Canada at the date of the formation of the Civil Code are not matters of mere conjecture, but result from the events which made it a British possession and the laws relating to it, which have since been duly passed. Nothing that occurred previously to the cession relative to the matters which are at issue in this case or even to the judicial opinion prevailing at any particular date can help their Lordships much, if at all. It must be remembered that before the cession Canada had been governed by the laws of a country which recognized no religion but the Roman Catholic. Protestants were allowed no civil rights; marriages performed

by them were held invalid and the children accounted bastards. When Canada became the possession of a Protestant Power, which though it had permitted the practice of the Catholic religion, put Catholics under grave disabilities, all this was of necessity changed. The laws of England would have obtained in Canada unchanged had it not been that stipulations were made in the various Capitulations and in the Act of Cession to secure religious freedom for Catholics. It is from these alone and the subsequent Acts of Parliament relating to Canada that all the rights of Roman Catholics in Canada are derived. Full effect must be given to the engagements thus entered into and the provisions of the laws thus passed. They are definite and ample to secure to the individual full religious liberty, but it is idle and without any justification to attempt to qualify their effect by references to the ancient position of Protestants and Roman Catholics in France under a regime which from the nature of things automatically disappeared when Canada came under British rule.

The aim and effect of the special terms of the Capitulations of Quebec and Montreal, which are contemporary documents of great value, are perfectly clear. What the Catholics sought to secure was freedom to exercise their religion and they obtained it. The meaning attached to this phrase is clear from its use in art. 27 of the Capitulation of Montreal, which reads as follows : " The free exercise of the Catholic Apostolic and Roman Religion shall subsist entire in such manner that all the states and the people of the towns and country places and distant parts shall continue to assemble in the churches and to frequent the Sacraments as heretofore without being molested in any way directly or indirectly."

What was happening in France to Churches other than the Roman Catholic had taught them the need of formally securing these rights on passing under the dominion of a Power belonging to a different faith, and therefore they stipulated for and obtained the free exercise of their religion. This is plainly expressed in the Treaty of Paris in 1763 by which the cession of Canada to the British Crown was ultimately accomplished. It is thus expressed in that Treaty : " His Britannic Majesty

J. C. 1921 DESPATIE v. TREMBLAY.

on his side agrees to grant the liberty of the Catholic Religion to the inhabitants of Canada. He will consequently give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit."

But it is not necessary to consider more fully these contemporary documents, because the effect of Canada passing under British sovereignty so far as the religious liberty of its Catholic inhabitants is concerned, is authoritatively expressed in the Quebec Act 14 Geo. 3, c. 83, s. 5, which reads as follows : " And for the more perfect security and ease of the minds of the inhabitants of the said Province it is hereby declared that his Majesty's subjects professing the religion of the Church of Rome of and in the said Province of Quebec may have hold and enjoy the free exercise of the religion of the Church of Rome subject to the King's supremacy declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the Dominions and Countries which then did or thereafter should belong to the Imperial Crown of this Realm, and that the clergy of the said Church may hold receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion."

The religious position in the Province of Quebec in 1774, was therefore that every individual had the right to profess and practise the Catholic religion without let or hindrance. But it must be borne in mind that this is a privilege granted to the individual. There is no legislative compulsion of any kind whatever. He may change his religion at will. If he remains in the Roman Catholic community he may, so far as the law is concerned, choose to be orthodox or not, subject to the inherent power of any voluntary community, such as the Roman Catholic Church, to decide the conditions on which he may remain a member of that community unless that power has been limited in some way by the past acts of the community itself. In other words, each member of the Roman Catholic community in Quebec possessed the same privileges as any other citizen so far as religious freedom is

concerned, save that he was not subject to any of the disabilities which then and, for a long time after, attached to Protestant dissenters. The Legislature did not put over him as a citizen any ecclesiastical jurisdiction. The decisions of the ecclesiastical Courts that existed in the Roman Church bound him solely as a matter of conscience. The Legislature gave to their decrees no civil effect nor bound any of its subjects to obey them. Indeed, the Act in art. 17 expressly reserves to His Majesty the power to set up Courts of ecclesiastical jurisdiction in the Province and to appoint judges thereof, although that power seems never to have been acted upon. But what has just been said must not be misunderstood. The law did not interfere in any way with the jurisdiction of any ecclesiastical Courts of the Roman Catholic religion over the members of that communion so far as questions of conscience were concerned. But it gave to them no civil operation. Whether the persons affected chose to recognize those decrees or not was a matter of individual choice which might, or might not, affect their continuance as members of that religious communion. But that was a matter which concerned themselves alone.

It is necessary now to pass in review a long series of legislative Acts relating to marriage, commencing with 35 Geo. 3, c. 4, and extending to c. 20 of the Consolidated Statutes of 1861. They throw strong light on the principles of the marriage law in Canada during that period. They establish conclusively that the law concerned itself primarily with marriage as bearing on social status and only incidentally with any religious questions affecting it. They accordingly manifest the great importance that was attached to the keeping of proper registers of baptisms, marriages and burials, which should be recognized as legal evidence of the matters contained therein and thus be authoritative on these all-important facts of legal status.

To understand these Acts properly one must bear in mind that this was a case of the annexation of a province in which the Roman Catholic religion had been the established religion to a realm in which the Church of England was the established

J. C. 1921 DESPATIE v. TREMBLAY.

religion. Accordingly we find that the first of these Acts—namely, 35 Geo. 3 (1795), c. 4—provided for the keeping of registers in each parish church of the Roman Catholic communion and also in each of the Protestant churches or congregations within the province "by the rector, curate, vicar or other priest or minister doing the parochial or clerical duty thereof." These registers are to be kept in duplicate and one copy is to be deposited in the office of the clerk of the Civil Court of King's Bench or provincial Court of the district, there to remain and be preserved. The copies are to be of equal authority as evidence. There are strict regulations as to what is to be contained in these entries and they are to be considered as legal evidence in all Courts of justice.

The statutes above referred to which followed in the wake of the above statute extend the privilege of keeping similar registers to other religious communities than the Roman Catholic Church or the Established Church of England. It is unnecessary here to specify the names of these communities, which are very numerous. The Scotch Church, the Congregational Societies, the Methodists and the Methodists New Connexion are examples. In cases such as the Free Will Baptist Church, where infant baptism is not performed, the registrar, instead of recording baptisms, is authorized to record births. The form of these statutes indicates that the authority to keep these registers was taken to carry with it the authority to solemnize marriages, although in some cases the latter was specifically given. The effect of these statutes is finally expressed in the Consolidated Statutes of Lower Canada, 1861, c. 20, s. 16, which enacts that "all regularly ordained priests and ministers" of all Protestant Churches in communion with the United Church of England and Ireland, or with the Church of Scotland, "and all regularly ordained priests and ministers of either of the said churches have had and shall have authority validly to solemnize marriage in Lower Canada." It then goes on to enumerate the various religious communities to which the before-mentioned special Acts refer and confirms the powers of their ministers validly to solemnize marriages according

to the provisions of those special Acts, and finally creates a universal obligation upon all the Protestant communities and all parish churches of the Roman Catholic communion to keep registers in the way described in the Act, which is in all material respects identical with the law previously existing. It re-enumerates the matters which are to be set out in the entries thus to be made in these registers.

The feature of all these Acts which is at once the most remarkable and the most material to the questions raised by this appeal, is that nowhere in this legislation (with the exception of the two Acts relating respectively to the Jews and the Society of Quakers, which will presently be considered specially) is there the slightest reference to the religious views of the persons to be married. The most minute directions are given as to the matters which are to be entered in the registers, and not one of these has any reference to the religious community to which the parties or either of them belonged or to the religious beliefs held by them or either of them. This point is so important that it is worth while to set out the specific provisions in the Consolidated Statutes, 1861, c. 20, which are mere repetitions of the provisions in the previous legislation. " 6. In the entries of a marriage in the registers aforesaid, mention shall be made in words of the day, month and year on which the marriage was celebrated, with the names, quality of occupation and place of abode of the contracting parties, whether they are of age or minors, and whether married after publication of banns or by dispensation or licence, and whether with the consent of their fathers, mothers, tutors or curators—if any they have in the country—also the names of two or more persons present at the marriage, and who, if relations of the husband and wife or either of them, shall declare on what side and in what degree they are related."

It is an irresistible conclusion from the language of these Marriage Acts that the authority given to the Protestant ministers to solemnize marriages was a perfectly general one, and depended in no way upon the religious belief of either or both of the persons to be married. The same is true of the

J. C. 1921 DESPATIE v. TREMBLAY.

priests of the Roman Catholic communion. They were never under any legal disability as to their solemnizing marriage between persons one or both of whom did not belong to their faith. With regard to the priests of the Roman Catholic communion it is clear that even under their own ecclesiastical law they were permitted to solemnize marriage where one of the contracting parties was not a Roman Catholic. It does not appear whether or not their ecclesiastical law permitted them to solemnize marriage between persons neither of whom belonged to their own communion, but this question is irrelevant. The Catholics of Canada were individually given freedom to exercise their religion, but they were not in any respect compelled to do so, and seeing that from the very first the ministers of the English Church and subsequently those of other Protestant communities, had authority to solemnize marriages without any restriction as to the religious views of the persons seeking to be married, it was open to Catholics as well as Protestants to avail themselves of the rights thus given them. Such was the position established in Canada by positive legislation, and even if French ordinances could be found bearing on this matter, they would not affect in any way the above conclusions. They were ordinances of a country where Protestant marriages were regarded as invalid. As has been already pointed out, this state of things ceased automatically when Quebec came under British rule. It needed no legislation to put an end to it.

The two exceptional cases of this class of Acts are 9 & 10 Geo. 4, c. 75, relating to the Jews, and 23 Vict. c. 11 (Canada), relating to Quakers, and although in some respects peculiar, they strongly confirm the conclusions to be drawn from the other legislation on these subjects. In the case of the Jews, power is given to every minister duly licensed to keep in duplicate a register " of all marriages and burials performed by him, and of all births which he may be required to record in such register by any person professing the Jewish religion." No other reference to the faith of the persons to whom the Act relates is contained in the Act, except a temporary provision that persons of the Jewish religion shall have the right

to require the births and deaths of their children to be registered within a certain period after the election of the trustees. Even here there is no restriction on the faith of either or even of both of the persons so married. The second case relates to the marriages of Quakers, who, as is well known, do not recognize any ministers and have very special formalities with regard to marriages. Here there is a certain degree of limitation in the case of those who desired to be married according to the forms peculiar to Quakers. The law validates marriages solemnized "according to the rites, usages and customs of the Religious Society of Friends," both in the past and in future, "between persons professing the faith of the said Religious Society of Friends, commonly called Quakers, or of whom one may belong to that denomination"; and it then proceeds to extend to that denomination the general legislation as to the keeping of registers "so far as the same is applicable." In no other Act authorizing any marriage to be solemnized is there any reference to or limitation in respect of the religious belief of the parties to be married, and the reason for this exception is evident.

Before leaving this subject and drawing the proper conclusions from the matters already dealt with, it is advisable to refer to the Act which recognized and formally confirmed the existence of religious liberty in Canada—namely, 14 & 15 Vict. c. 175. The preamble is as follows: "Whereas the recognition of legal equality among all religious denominations is an admitted principle of colonial legislation: And whereas in the state and condition of this province to which such a principle is peculiarly applicable it is desirable that the same should receive the sanction of direct legislative authority, recognizing and declaring the same as a fundamental principle of our civil polity;" it declares and enacts: "That the free exercise and enjoyment of religious profession and worship without discrimination or preference, so as the same be not made an excuse for acts of licentiousness or a justification of practices inconsistent with the peace and safety of the province, is by the constitution and laws of this province allowed to all Her Majesty's subjects within the same."

J. C. 1921 DESPATIE v. TREMBLAY.

The position of the law as to marriage at the time of the formation of the Civil Code in Quebec was, therefore, as follows: The Roman Catholic curés, Protestant clergymen and ministers of a large number of denominations of Protestants had an equal power to solemnize marriages and to keep registers of acts of civil status. In all cases alike the marriages must be preceded by banns unless they had been dispensed with by a competent authority or a licence had been granted. There was no restriction as to the religious faith of those whose marriages they were competent to solemnize. For example, a Protestant might be married to a Roman Catholic either by a Roman Catholic curé or a Protestant minister, or by any other person empowered to solemnize marriages. If the marriage was solemnized by a competent person an entry must be made of it in the register he was authorised to keep and that register was legal evidence of the fact of the marriage. With regard to the validity of the marriage, so far as affected by relationship between the parties, there was no legal restriction, excepting such as was imposed by the Statute 32 Hen. 8, c. 38, which enacts "that no reservation or prohibition, God's Law excepted, shall trouble or impeach any marriage without Levitical degrees." No doubt the Roman Catholic clergy could not be compelled to solemnize any marriage that was according to their religious belief forbidden, but this was by virtue of the liberty that was given to them to exercise and practise their religion uninterfered with, and it is evident from the declaration contained in the Act of 14 & 15 Vict. c. 175, that ministers of other denominations might have claimed an equal right to refuse to solemnize a marriage which was contrary to their religious belief. In this as in all other matters the rights of Protestants and Roman Catholics were the same so far as they were not directly affected by legislation. But so far as concerned the persons to be married relationship other than such as fell within the Levitical degrees created no inherent impossibility of marriage.

It is in the light of these existing rights established by statute and reigning as law in the province of Quebec that

we must interpret the effect of art. 127 of the Code. Its object and effect were to leave the law as it then stood in those matters. It is, therefore, impossible to give to it the effect of prohibiting marriage between any two persons who were, according to English law, free to marry. It might prevent them having the act solemnized by ministers of a special denomination, but that would be solely in virtue of the right of the minister to refuse to perform the marriage, and not from any legal incapacity to contract a valid marriage. Art. 127, which preserves the consequences of the views of the different religious communities with regard to impediments, has therefore no bearing on any inherent incapacity of the parties to contract a valid marriage (which is regulated by the previous clauses of the chapter in which art. 127 appears) but only preserves the right of each religious communion to recognize the impediments which exist according to its faith, and justifies the refusal of a minister of that communion to solemnize any marriage which offended against its rules. This explains why there is no provision in the Code for annulling marriages which might have been objected to under art. 127, although specific provisions are inserted for this purpose in the case of marriages offending against arts. 124, 125 and 126.

In the Code, marriage is treated as an act of civil status, and although there are provisions limiting the persons between whom marriage can take place and providing for infractions of such provisions, yet the care of the Legislature has been mainly expended on providing for the proper solemnization of marriages and for the preparation of authentic registers of duly solemnized marriages which registers are kept in duplicate and are legal evidence of the marriage having taken place. In this respect the existing procedure is in substance retained. These registers are kept by the persons solemnizing the marriage, and one copy is deposited with the prothonotary of the district in which the marriage was celebrated. The matters to be entered in the register of marriages are specifically enumerated and, as previously, they contain nothing that relates to the religious faith of the parties. The

J. C. 1921 DESPATIE v. TREMBLAY.

importance of this is increased by the provisions of art. 39, which enacts that "in acts of civil status nothing is to be inserted either by note or recital, but what it is the duty of the parties to declare."

The articles which deal with the formalities relating to the solemnization of marriage show the same absence of any reference to the religious beliefs of the persons to be married. They are principally concerned with securing that they are performed by a proper public functionary, and that due publication of banns has been made or licences granted in lieu thereof. The vital clauses are: "128. Marriage must be solemnized openly by a competent officer recognized by law. 129. All priests, rectors, ministers and other officers authorized by law to keep registers of acts of civil status are competent to solemnize marriage."

There is therefore a general power of all such competent officers to solemnize marriages of all kinds. There is, however, an addition of the nature of a proviso to art. 129, which is very instructive as showing the care exercised by the Legislature in preserving the religious freedom of the individual. But it shows itself (as ought to be the case) in protecting the religious freedom of the officers solemnizing the marriages and not in restricting the freedom of the parties seeking to be married. It reads: "But none of the officers thus authorized can be compelled to solemnize a marriage to which any impediment exists according to the doctrine and belief of his religion, and the discipline of the Church to which he belongs."

It contemplates therefore not only the possibility of valid marriages to which there are objections according to the creed of any particular religious denomination, but even that an officer holding that creed has authority to solemnize such a marriage though he is not compellable to do so.

The Code then proceeds to deal with the banns which in the absence of a dispensation or licence from a competent authority must be published before the marriage can be solemnized. The Code contemplates (as would naturally be the case) that they will generally be published at the churches

to which the persons belong, but permits the exemption from such publication by licences of a competent authority. Such licences in the case of the solemnization of marriage by Protestant ministers of the Gospel are issued by the Provincial Secretary under the hand and seal of the Lieutenant-Governor, once more indicating that the Code is concerned with the position of the officer solemnizing the marriage and not with any question of the religious belief of the persons to be married.

There remain the two important chapters dealing respectively with "the qualities and conditions necessary for contracting marriage" and "actions for annulling marriage," which must be examined in detail. The first deals with several well-defined cases of parties between whom and the circumstances in which marriage is not permitted. The second deals with the cases in which, the persons at whose instance, and the circumstances under which a marriage which has taken place may be contested and annulled. In the former chapter we find express prohibition against marriage under age or without certain consents or within certain degrees of affinity corresponding with the Levitical degrees, followed as to affinity outside those degrees by an article (art. 127), which is in very different terms; and when we turn to the chapter on actions for annulling marriages we find specific provisions how, when and by whom marriages which are infractions of the rules laid down in the chapter which has just been considered can be contested, and it appears that each one of the rules (excepting, of course, art. 127) is considered in turn, and that the circumstances under which the marriage can be contested are specified. Taking them in order, a marriage contracted by a person under the legal age can no longer be contested six months after the legal age has been attained, or if, being a woman, she has conceived before that time. In art. 116 it is laid down that there is no marriage when there is no consent (which no doubt includes the case of there being error of person). Yet in arts. 148 and 149 it is provided that the marriage can only be contested by the party whose consent was not free, or who was led into error, and then only before six months have passed after such

J. C. 1921 DESPATIE v. TREMBLAY.

person has acquired full liberty or become aware of the error. Impotency is by art. 117 declared to render the marriage null, but it is provided that such nullity can only be invoked by the party who has contracted with the impotent person, and in any case not at any time after three years after the marriage.

Arts. 119 to 122 provide for the necessity of consent of parents or guardians in the case of minors. Yet in arts. 150 and 151 it is provided that marriages contracted without the proper consent can only be attacked by those whose consent was required, and then only within six months of their becoming aware that the marriage has taken place. Arts. 124, 125 and 126 expressly prohibit marriage between persons who are within what are known as the Levitical degrees. An example is art. 126: "126. Marriage is also prohibited between uncle and niece, aunt and nephew." On turning to the chapter of "Actions for Annulling Marriages," we find it is provided that such a marriage may be contested either by the parties themselves or by any of those having an interest therein, but in art. 155 it is provided that that interest must be existing and actual to permit the exercise of the right of action by the grandparents, collateral relatives, children born of another marriage and third persons. In each of these cases, therefore, when the second chapter contains an express prohibition of marriage, provision is made by chapter 4 for deferring and limiting the power to get the marriage annulled; but in respect of marriages which are subject only to the impediments referred to in art. 127 no such provision is made.

In these circumstances their Lordships are of opinion that it is impossible to resist the conclusion to be drawn from the omission of any reference to art. 127 in the chapter on "actions for annulling marriages." They are of opinion that by deliberately omitting any provision for contesting marriages to which objection might be taken under that article, it was intended that such marriages once solemnized should remain valid. This is in exact conformity with the standard of religious liberty of the individual already existing.

The parties to whom such objections as those referred to in art. 127 would apply, possessed no inherent incompatibility for marriage in the eye of the law. Any such incompatibility was merely a question of conscience or orthodoxy, and would not have prevented their being married by other competent officials or with other rites. It would have been absolutely out of harmony with the other relevant provisions of the Code that marriages of this kind should be allowed to be contested, and accordingly we find that there is in the Code no provision for contesting them. Accordingly they with all other duly solemnized marriages come under the provisions of art. 161 : " 161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act." To prevent the application of so stringent a clause as this, there must be some equally explicit provision that in special cases the marriage can be annulled. Nothing less than this can get rid of the operation of its clear and precise provisions.

It remains to apply the law thus enunciated to the circumstances of this case. The marriage was contracted in all good faith. It was solemnized openly by a competent official and after due proclamation of the banns. It may be taken that if all the facts as to the relationship of the parties had been known the officiating priest would have required the parties to obtain a dispensation, seeing that at that date the Roman Catholic Church considered the extremely distant relationship sufficient to make a dispensation necessary, although their Lordships understand that such is no longer the case. Had he refused to solemnize the marriage without such a dispensation being obtained he would have been within his rights, and the law would have supported him in his refusal. But nothing of the sort took place. The marriage was performed with all legal formalities, and did not come within any provisions of the Code which deal with questions of nullity. The relationship of the parties was not within the provisions of arts. 124, 125 or 126, in respect of which actions contesting marriages on the ground of relationship can alone be brought. The marriage therefore falls under the

J. C. 1921 DESPATIE v. TREMBLAY.

absolute rule laid down in art. 185: "Marriage can only be dissolved by the natural death of one of the parties; while both live it is indissoluble."

Their Lordships are therefore of opinion that this appeal should be allowed, and that the marriage between the parties should be declared valid and subsisting. They will humbly advise His Majesty accordingly. There will be no order as to costs.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1921 *March* 1.

THOMPSON . . . . . APPELLANT;

AND

MALAN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION.

South Africa—Mines and Minerals—Precious Stones—Proclamation of Mine—Private Property—Change of Ownership after prospecting—Precious Stones Act, 1899 (*No.* 11 *of* 1899, *Cape*), *s.* 41.

By s. 41 of the Precious Stones Act, 1899 (Cape): "It shall not be lawful for the Governor to proclaim any portion of private property a mine or alluvial digging so long as the owner thereof does not himself prospect thereon for precious stones or give permission to any duly licensed prospector to do so . . . .":—

Held, that the words "the owner thereof" in the above provision do not mean the owner at the time of the proclamation, but the owner at the time of the prospecting, or the giving of leave to prospect, which led to the discovery of precious stones, whereby the procedure provided by the Act, leading in due course to a proclamation, has been set in motion.

Judgment of the Appellate Division affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of South Africa (July 31, 1919) reversing

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

a judgment of the Griqualand West Local Division of that Court.

On December 13, 1918, the Governor-General of the Union of South Africa made a proclamation under ss. 27 and 101 of the Precious Stones Act, 1899, of the Cape of Good Hope, proclaiming (among other farms) a farm known as "Thompson's Hope B," an alluvial diamond digging.

On January 13, 1919, the appellant, who at the date of the proclamation was the registered owner of the farm, commenced the present proceedings against the respondent, the Minister of Mines and Industries, for a declaration that the proclamation, and the Government notice thereof, were unlawful and ultra vires.

The question for determination in the case was whether in the circumstances stated in the judgment of their Lordships the Governor-General was precluded by s. 41 of the Act above-named from making the proclamation.

The trial judge (Lange J.) granted the appellant a declaration that the proclamation and notice were unlawful and ultra vires, so far as they referred to the farm Thompson's Hope B. On appeal the Appellate Division (Solomon A.C.J. and de Villiers J.; Maasdorp J. dissenting) reversed that decision. The appeal is reported at 1919, A.D. 404.

1921. Jan. 27. *Maugham K.C.* and *H. E. Wright* for the appellant.

Hemmerde K.C., *Nightingale K.C.*, and *G. R. Blanco-White* for the respondent.

March 1. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Appellate Division of the Supreme Court of South Africa, dated July 31, 1919 (Solomon A.C.J., and De Villiers J. ; with Maasdorp J. dissenting). This appeal resulted in the reversal of the judgment of Lange J. in the Griqualand West Local Division of the Supreme Court of South Africa. The judgment of Lange J. was dated March 18, 1919.

J. C. 1921 THOMPSON v. MALAN.

The question in the appeal is as to the proper construction to be placed upon the first portion of s. 41 of the Precious Stones Act, 1899, of the Cape of Good Hope.

The fact which raises the question is this, that after the time of prospecting for and discovery of diamonds upon a farm called " Thompson's Hope B," followed by Government inspection and all the procedure according to statute, and before the actual proclamation of the farm under the Act, the farm changed ownership. It is admitted that the owner at the date of prospecting, etc., would have been bound by the proclamation, but it is maintained that the owner at the date of the proclamation is not. The transfer of ownership is said to give the transferee, the new proprietor, a right to the judicial declaration which he claims, the fundamental portion of which is that the proclamation and the Government notice are unlawful and ultra vires.

Although the point can be thus briefly stated, and is limited as mentioned to the construction of a few words in this section, the question is one of considerable importance. As will be shown, it affects the rights, not only of the owner of the land where diamonds are found, but of the prospector of diamonds therein, and of the Government as owner of precious stones reserved from the land grant and as representing the public of the Colony. Mr. Malan, the Minister of Mines and Industries, and as such representing the Government of the Union of South Africa, was properly convened as defendant in the action and is the respondent in this appeal.

The history of the property, so far as material to the issue, may be stated in a few sentences. The narrative is confined to the farm mentioned—namely, " Thompson's Hope B "—and no reference need here be made to other properties covered by the suit but with regard to which there is no question in appeal.

The appellant bought the farm on April 16, 1918, his predecessor in title being one Cyril George Holliday. " Thompson's Hope B " extended to 665 morgen and was a portion of a larger piece of land called " Boesmanspoort."

Holliday had owned Boesmanspoort for less than two years—namely, between June 1916, when he bought it, and April 16, 1918, when, as stated, he sold it to the appellant. During Mr. Holliday's ownership it is an admitted fact of the case that diamonds were discovered upon the farm. It is indeed sufficient to adopt the summing up, upon this subject, made by the learned Maasdorp J.: "Under the admissions contained in paragraph 1 of the plaintiff's replication that the farm Thompson's Hope B as portion of Boesmanspoort was duly prospected during the ownership of the plaintiff's predecessors and diamonds discovered thereon, we must take it that at that time a duly licensed prospector or the owners themselves had duly prospected the property, and it would follow that during the tenure of such predecessors all conditions had been fulfilled which would have entitled the Governor to proclaim the land an alluvial digging whilst they owned the land."

The question accordingly is broadly raised whether a change of ownership subsequent to all this, but prior to the actual proclamation, renders the proclamation void.

In view of the differences of opinion in the Courts below and of the careful arguments presented to the Board, a brief survey may be made of the procedure prescribed by Act No. 11 of 1899 of the Cape of Good Hope relating to the prospecting and mining for precious stones. The property in question is stated to be an alluvial digging as distinct from a mine under the statute. No materiality, however, attaches to that distinction so far as the question to be settled is concerned.

By s. 4, any person satisfying the Civil Commissioner that he is a person of good character is at liberty to take out a licence to prospect, and by s. 5 this licence lasts for twelve months. It is provided, however, by s. 6 that no owner of private property shall be obliged to allow a licensed prospector to prospect thereon, but he may give the Government licensee leave to prospect for such consideration as may be agreed upon between the prospector and himself. Once this leave is granted, the prospector may start operations

J. C. 1921 THOMPSON v. MALAN.

within the limits defined. Under s. 11, if he find any precious stones, he is bound within one month to give notice thereof, making declaration of the number and value, and being liable, if he fails to do so, to conviction, fine and imprisonment.

It is convenient in this connection to note s. 45, which provides for the case of what may be termed the owner being his own prospector. He can himself prospect without taking out any licence, and if he makes a discovery of diamonds he shall have the same rights and the same obligations to disclose the results to the Government; while with regard to the penalties, the result of his failure to make a full and proper disclosure is that in his case he forfeits all rights reserved to him under the Act. The stage has accordingly been reached in which there are brought into view the respective rights of the owner, the Government, and the prospector.

By s. 12 the holder of a prospecting licence who has got the owner's leave, has prospected, and has proved to the satisfaction of the Civil Commissioner his discovery of precious stones, is entitled to fifty claims in block at the place where the precious stones have been found on its being proclaimed a mine; and by s. 82 the discoverer is entitled to twenty claims in block if the precious stones are proclaimed as in an alluvial digging.

Sect. 14 may be considered of importance at this stage, for it provides that should the Governor not proclaim within three months after the granting of the certificate to the prospector then the prospector as holder of the certificate may beacon off and hold, "subject to the terms and conditions of any agreement between himself and the owner," the claims to which the certificate entitles him in the same manner as if the proclamation had been made. An important proviso however follows—namely, that "nothing herein contained shall be deemed or taken in any way to interfere with the rights and power of the Governor at any time to proclaim a mine including the claims so beaconed off." Up to this stage, accordingly, the assumption apparently is that matters proceed with reasonable despatch and that the

prospector, notwithstanding a certain Government delay, may, on agreeing with the owner, have his rights fixed, but yet that the Government may subsequently, when they do issue the proclamation, see that it includes those portions so as to speak beaconed off by way of anticipation by the prospector.

As to the Government itself, s. 15 provides that the Governor may at any time and shall prior to proclamation take proper steps for testing the character, payable qualities and extent of the deposit, and may incur the requisite expenses; and by ss. 19 and 20, after the proclamation and on a day intimated in the *Gazette* an inspector visits the spot with plans and surveys, the discoverer, owner and prospector select their claims; and the remaining claims are publicly sold.

All these operations proceed by steps which make the ultimate proclamation and the division of the diamond field follow the initial step of the prospecting with licence and leave. And it must be remembered that the owner of the diamonds is not the owner of the surface. The latter holds his property subject to the reservation to the Crown of precious stones and minerals. Before, however, the Crown property can be realized, the steps of notice are taken by the Act as prescribed, and the laying out of the mine, the allowances prescribed for the surface owner and to the prospector have to be made.

The rights of the Crown are not left to rest merely upon reservation. In this connection s. 27 of the statute is of much importance: "Whenever precious stones shall be discovered on Crown lands or on private property and the Governor shall be satisfied after taking the steps mentioned in s. 15 of this Act that precious stones do exist in payable quantities it shall be lawful for the Governor to proclaim the area described in the proclamation a mine and the Governor shall be empowered to make all such rules orders regulations or bye-laws as he may deem necessary or expedient for the proper laying out surveying enlargement or contraction of any mining areas and depositing floors in connection with such mine and generally all matters and things connected with the proper and efficient working thereof." By

J. C. 1921

THOMPSON v. MALAN.

s. 101 the above-quoted s. 27 is made to apply to alluvial diggings.

Three general conditions are therefore required as preliminaries to proclamation: First, the discovery (after licence and leave in the case of a prospector who is not himself the owner); second, under s. 15, steps taken by the Government for the purpose of testing the character, payable qualities and extent of the place; and third, that the Governor be satisfied "that precious stones do exist in payable quantities." It is an admitted fact in this case that each one of these conditions was satisfied prior to the issue of the proclamation which is challenged. Their Lordships are accordingly of opinion that s. 27 is equivalent in such circumstances to a definite declaration of the lawfulness of the proclamation. The question that remains accordingly is whether the further language of the statute is sufficient to operate in the case of a change of ownership between the satisfying of these conditions and the proclamation itself as a repeal of s. 27, or an impediment of such a character as to justify the declarations by a Court of law such as are asked for in the present case—namely, first, that the proclamation is unlawful and ultra vires, and, second, that if and so long as the new and existing owner should not prospect or allow prospecting upon his farm, the Government has no power or right to issue a proclamation.

The effects of the repeal or impediment referred to are sufficiently manifest. It is plain on the one hand that the interests of the colony may be deeply affected both in its revenues and its development if a change of ownership of the surface were thus to prevent the exploitation of the colonial mineral resources. On the other hand the rights given to the surface owner must not be impaired by reason of any general consideration except and so far as the latter bears upon the true construction of the Act, but must be measured by the provisions of the statute themselves.

Their Lordships desire to record their sense of the careful analysis of the statute made by all the judges of the Court below, who appear to have had those considerations fully in mind.

The sole foundation of the appellant's case is s. 41, the material words of which are as follows: "It shall not be lawful for the Governor to proclaim any portion of private property a mine or alluvial digging so long as the owner thereof does not himself prospect thereon for precious stones or give permission to any duly licensed prospector to do so."

What is meant by the words "so long as the owner thereof does not himself prospect . . . . or give permission to any . . . . prospector to do so"? They are used in the present tense, and a literal construction of them is accordingly impossible, because it would point to a Government act of proclamation taking place while the owner or his prospector was at the job of prospecting. It is quite manifest that proclamation and prospecting cannot thus synchronise. Such a proclamation is an impossibility because no proclamation whatsoever is permitted until after those proceedings which have been referred to, under which prospecting and Government examination and the Governor's satisfaction with the result have been all concluded. Such a thing accordingly is, as has been stated, an impossibility, and the present tense "so long as the owner does not prospect or give permission" must accordingly be a form of expression used in a past sense, a sense which might have been better put into words by saying, "in the event of the owner not having prospected or given permission to prospect."

The Act, in short, makes a proclamation the legitimate culmination of the other steps which have been legitimately taken—licensing, leave, prospecting, inspecting, Government satisfaction—all as set forth in the Act. The only one of these steps in which the owner of the surface had to be appealed to was the step of leave given by him to a person duly licensed by the Government to prospect. All the other steps, once that leave be granted, duly proceed under the statute. Who then is the owner who is referred to in the phrase "so long as the owner does not prospect or give permission"? In their Lordships' opinion, it was that owner who de facto had prospected or given permission. In the present case the owner did give permission, and once

J. C. 1921 THOMPSON v. MALAN.

this statutory procedure has thus been set in motion it is, in the opinion of the Board, illegitimate by a transfer of ownership to avoid the regular sequence of procedure up to a proclamation.

When leave is granted by the owner for the time being to a prospector, he does so on such terms and conditions as he can make with the prospector, and once the prospector, having, it may be, had imposed upon him very onerous terms and conditions, has obtained the surface owner's leave, that prospector as well as the Government has rights under the statute which fall to be respected. A change of ownership effected as in the present case might result in hanging up the prospector's rights indefinitely unless indeed he were to enter into a fresh bargain with the fresh owner, with the identical risk that a fresh change of ownership prior to proclamation would substantially undo that transaction also. These are only some illustrations of what would follow were the term " owner " in s. 41 to be construed as owner at the date of the issue of the proclamation. In the opinion of the Board, the words do not mean that, but they mean the owner at the time of the prospecting or granting of the leave to prospect. Once that leave has been granted, then the condition has been satisfied and the awkward words " so long as," which truly mean " in the event of," have been given their full scope.

It is possible to figure a case in which, after prospecting, nothing more is done for a long space of time, and all parties allow the land to remain undisturbed so far as the discovery of precious stones is concerned; and no doubt in such a case it might be maintained that all proceedings had to start de novo. But no such course of years was run in the present case, and no such problem is presented.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Budd, Jenkins, Jecks & Colclough.*

Solicitors for respondent: *Hackett-Jones, Bisgood, Marshall & Thomas.*

[PRIVY COUNCIL.]

THE EDNA.

J. C.*
1921
March 10.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral Ship—Purchase from Enemy—Validity of Purchase—Previous Services to Enemy Cruiser—"Fleet Auxiliary"—Damages—Profits of Ship under Requisition—Declaration of London, 1909, *art.* 56.

In the autumn of 1914 a vessel owned by a Mexican company, but in fact of German character, rendered services to a German cruiser in the supply of coal and in other respects; she however took no direct part in hostilities, and was not in the employment of the German Government, nor under the control of an agent placed on board by that Government. In October, 1915, she was bought bona fide and paid for by a neutral firm. In January, 1916, the vessel was captured by a British cruiser, and subsequently she was requisitioned by the British Government. The vessel's condemnation was sought on the ground that the sale was invalid; the neutral purchasers claimed damages and costs, also the profits derived from the use of the vessel:—

Held, that the vessel could not be regarded as having been an auxiliary to the German fleet so as to be subject to the disability of transfer attaching to warships, and that the purchasers having genuinely bought her were entitled to her release, the object of the sellers in selling being material only in considering whether there had been a complete transfer of ownership.

The Ariel (1857) 11 Moo. P. C. 119 and *The Baltica* (1857) 11 Moo. P. C. 141 followed, rather than a construction of art. 56 of the Declaration of London which would give neutrals more restricted rights.

Held, on a cross-appeal, that the neutral owners were not entitled to damages or costs, since on the facts (including those unknown at the time of capture) there was substantial ground for questioning the neutral or private character of the ship, and the claimants' case had been supported by flagrantly false affidavits which rendered a judicial inquiry a reasonable requirement; and that in any case the claim to the profits earned by the use of the ship under requisition could not be sustained.

Judgment of the Prize Court affirmed.

APPEAL and CROSS-APPEAL from a judgment of the Admiralty Division (in Prize), delivered on April 2, 1919. (1)

The Procurator-General appealed from a decree of the President (Lord Sterndale) whereby the steamship *Edna* (ex *Mazatlan*) was pronounced to have belonged to the

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1919] P. 157.

J. C. 1921 THE EDNA.

claimants, Sudden and Christenson (an American firm), and being under requisition was ordered to be handed back to the Admiralty Marshal and forthwith released by him to the claimants, and the Procurator-General was ordered to make good to the claimants the amount of deterioration, if any, of the steamship during the time she was in the service of His Majesty, and to pay to the claimants the freight earned by the steamship on the voyage upon which she was captured. The claimants cross-appealed from that part of the decree whereby the President declined to order that any sum should be paid to them in respect of the earnings, or hire, or user of the steamship while under requisition to His Majesty, and declined to make any order as to costs.

The facts appear from the judgment of their Lordships.

1920. Oct. 19, 21. *Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* (*Clement Davies* with them) for the Procurator-General. Owing to the relation in August and September, 1914, between the *Edna*, then called the *Mazatlan*, and the German armed forces in South American waters, she could not be transferred to neutrals so as to escape liability to capture during the continuance of the war. This case is distinguishable from *The Alwina* (1), in which there was an unfulfilled intention to carry coal to enemy warships; in the present case the evidence shows that the ship was a German fleet auxiliary. [*The Ceylon* (2), *The Minerva* (3) and *The Vrow Elizabeth* (4) were also referred to.] But in any case the ship being of enemy character could not be transferred unless the transfer was proved to be bona fide—namely, not made to evade the risk of capture: Declaration of London, 1909, art. 56. It is the motive of the seller which has to be ascertained rather than that of the buyer; though it is conceded that it is not sufficient for captors to say that the effect of the transfer is to avoid capture. Even if all the external circumstances are in order the Court has still to be satisfied that the transfer was bona fide in the sense already indicated.

(1) [1918] A. C. 444.
(2) (1811) 1 Dods. 105.
(3) (1807) 6 C. Rob. 396.
(4) (1803) 5 C. Rob. 2.

Sir Erle Richards K.C. (*Le Quesne* and *Van Breda* with him) for the claimants. It was found as a fact, and not disputed, that the claimants were bona fide purchasers. Unless the ship is to be regarded as part of the armed forces of the enemy, *The Ariel* (1) and *The Baltica* (2) are conclusive that it is sufficient to show that there was a complete transfer reserving no right to the transferor. If art. 56 of the Declaration of London imposes upon neutrals any test more severe than that laid down in those decisions it is invalid under *The Zamora*. (3) The evidence did not show that the ship had been so incorporated into the German fleet as to be subject to the same special disability of transfer as a warship. [Reference was made to Hague Conventions, Nos. 7, 12.] Upon the cross-appeal the claimants were entitled to damages under the rule laid down in *The Ostsee*. (4) The good faith of the claimants being found, it cannot be said that their conduct gave rise to suspicion.

Sir Ernest Pollock S.-G. for the Procurator-General as respondent to the cross-appeal. On the facts there was a substantial case of suspicion, and the circumstances and conduct of the claimants justified the Procurator-General in requiring the case to be submitted to the Prize Court. In *The Ostsee* (4) the captors acted entirely upon a mistake of law, there was therefore nothing to justify the capture. In the case of the release of a ship which has been requisitioned it has been the practice to allow for deterioration other than that resulting from wear and tear (e.g., as to boilers).

Sir Erle Richards K.C. replied on the cross-appeal.

1921. March 10. The judgment of their Lordships was delivered by

LORD SUMNER. These are consolidated appeals from a decree of Lord Sterndale, President, ordering the release of the steamship *Edna*. Her owners, the claimants, ask for costs and damages as well : the Crown asks for condemnation.

The *Edna* changed hands and flags and names several times

(1) 11 Moo. P. C. 119.
(2) 11 Moo. P. C. 141.
(3) [1916] 2 A. C. 77.
(4) (1855) 9 Moo. P. C. 150.

J. C. 1921 THE EDNA.

in about eighteen months. Before March, 1914, she was the *Jason*, a Norwegian ship belonging to the Aktieselskabet Dampskibet Jason. Then a Mexican Company, the Lloyd Mexicano Societa Anonyma, bought her, and she became the *Mazatlan* on the Mexican Register. The moving spirit in this transaction was a German named Friedrich Jebsen, who had incorporated the Lloyd Mexicano. His interest in its capital was so preponderant and his control over it and the *Mazatlan* was so complete that she thereby became a ship of enemy character on the outbreak of the war. The learned President's finding of this fact is not now contested. In October, 1914, the *Mazatlan* was requisitioned as a military transport in Mexican waters by persons acting on behalf of a Government, whether existing de facto or de jure, on some part of the Pacific coast of Mexico, and they had possession of her for about a year. Meantime there was in San Francisco a company called the International Banking Corporation, managed by a Mr. Wilson, which had lent money to the Lloyd Mexicano in 1913 and 1914, and a company called the Executive Company had also been in existence there since 1907, which was not a shipowning company, whatever else it may have been, and had a paid up capital of only $300. In February, 1915, Jebsen agreed to sell the *Mazatlan* to this Executive Company for $1000 down and $114,000 payable by instalments, when the ship could be got out of Mexican hands and delivered at San Francisco. While awaiting that event the Executive Company by amending its articles took powers to own a ship and manage her. Not satisfied with this, Jebsen in May founded a company in San Francisco called the Western Pacific Steamship Company, with the above-mentioned Mr. Wilson as its treasurer. In April the Lloyd Mexicano transferred the ownership of the *Mazatlan* to him for a purported consideration of $115,000 then paid, and in July he re-transferred her to this Western Pacific Steamship Company for a nominal consideration of $10. He was also allotted all the last-named Company's share capital except three shares of $100 each. Somehow or other the authorities in Mexico who had control of the *Mazatlan* were then induced

to release her. If, as is probable, somebody had to be paid a consideration for this purpose, the money seems to have come, not from the Executive Company or the Western Pacific Steamship Company, but from the International Banking Corporation.

In October, 1915, the *Mazatlan*, still flying the Mexican flag, returned to San Francisco. By this time an agreement had been arrived at with the present claimants, a firm of United States citizens carrying on business there, for the purchase of the vessel at the price of $125,000, and eventually a bill of sale in their favour from the Executive Company was duly executed and recorded. They received possession of the ship, changed her name to the *Edna*, placed her on the United States Register of Shipping, and paid over their purchase money, of which the Executive Company got $11,000 and the Lloyd Mexicano $114,000. $50,000 of this were promptly remitted to Germany on Jebsen's account. The *Edna* thereafter traded under charter for the benefit of the claimants till January, 1916, when she was captured at sea by H.M.S. *Newcastle*. She was afterwards duly requisitioned for the use of His Majesty by order of the Prize Court.

How the Mexican steamship *Mazatlan* became in 1915 the United States steamship *Edna* would have involved a critical examination were it not that the Crown does not now dispute that the claimants bought and paid for the ship in entire good faith. This view was only adopted at a late stage. After a member of the claimants' firm had been eventually called as a witness at the trial and had been cross-examined, the advisers of the Crown confessed themselves satisfied. Accordingly two grounds only are now relied on for the captors, both going to the validity of the title acquired by the claimants—first, that such a transfer cannot be valid unless the claimants show that not only they, but also their transferor acted in good faith, that is, without any purpose of defeating the belligerent rights of the Crown; second, that in the autumn of 1914 the *Mazatlan* was not only a ship of enemy character, but also stood in such a relation to the enemy Government that during the war no transfer

J. C. 1921 THE EDNA.

of her at all would be competent or recognizable in a Court of Prize.

It is not enough to show that she was then engaged in carrying contraband of war or in rendering services to His Majesty's enemies, which, if followed sufficiently closely by capture, would have made her liable to condemnation in spite of her Mexican registry. Many months had passed since the autumn of 1914 before she was seized, and that chapter in her adventures had long been closed. Of course, if she still bore an enemy character in January, 1916, that in itself made her good prize, but neutrals like the claimants are entitled to purchase and take delivery of a private enemy merchantman in a neutral port, and if the transaction is complete and without reservation, as this transaction was, it stands and the ship is thereafter neutral. Accordingly the curious intervention of the companies above described between Jebsen and the claimants before the *Mazatlan* was sold in 1915 and her adventures in 1914 are relied on as showing the imperative reasons which Jebsen had for getting rid of her, and the consequence is said to be that while his object was to defeat the capture, which he knew to await her, that object was itself defeated by the fact that she had been in 1914 part of the enemy's resources for war.

There is evidence given by Admiral Sir W. R. Hall, then Director of the Intelligence Division of the Admiralty, that: "before the outbreak of the present war the German Government had made plans and arrangements whereby at various ports on the western coast of North and South America merchant ships were to be provided to act as fleet auxiliaries to the German cruisers operating in the Pacific," and it is contended that Jebsen was a German agent, who arranged that the *Mazatlan* should so act. No definition is given of a "fleet auxiliary," nor is it shown to be a term of art. It does not appear to have been considered by any Court before this case. Doubtless a fleet auxiliary renders help to a fleet, but what help, or what fleet, is in this connection another matter. The evidence above quoted is not contradicted and is entirely probable in itself.

J. C. 1921 THE EDNA.

Jebsen was a person of zeal and ability. He was determined to help his country in the war and was not too particular how he did it. It is, however, by no means obvious that such a determination involved his making his own ship a "fleet auxiliary" and taking the consequences himself, nor is it clear that to do so was the best way of giving assistance. The story begins with a German consul in San Francisco overreaching himself. The German cruiser *Leipzig*, then operating in the North Pacific, came into San Francisco to bunker. The consul, unwarrantably presuming on the indifference of the United States officials, ordered for her the very large quantity of 1000 tons of coal, but they refused to allow more to be shipped than enough to take her directly to Apia, the nearest German port. The *Leipzig*, however, was not bound for Apia. She was cruising in search of British merchantmen, a much longer voyage. At this point Jebsen showed himself a man of resource. The *Mazatlan* was then engaged in trading down the coast, calling at Mexican and other ports, where it was hoped (though doubtless without justification) that the local officials might be less incorruptible or more supine than those of the United States. In addition to her general cargo she obligingly loaded 500 tons of this coal for Guaymas, and also took on board what was believed to be a wireless telegraphic apparatus, with its operator, a German naval reservist, and some bags of letters. On her way down she called at San Pedro and there picked up Jebsen and some ladies, and three days later she happened to find the *Leipzig* in Ballenas Bay, anchored near her, and transferred to her the operator and the apparatus, the reservist and the bags. At Guaymas she found a German vessel called the *Marie*, which belonged to a relative of Jebsen's and was clearly a tender to the *Leipzig*. Here Jebsen went ashore and the coal was discharged into lighters, and no doubt has been suggested that it was duly transferred, directly or indirectly, to the *Leipzig*. The *Mazatlan* then proceeded to her next port of call, Topolobampo, where Jebsen again joined her, and soon afterwards she was requisitioned for a short time for Mexican use. Attempts had been made by him and by her captain to get into wireless communication

J. C. 1921 THE EDNA.

with the *Leipzig* throughout the voyage, which the English operator thwarted by putting the apparatus out of order. His courage and resource no doubt deprived the *Leipzig* of much information, and his vigilance in communicating with the British consular authorities as opportunity served had probably the result that the operations of the *Mazatlan* were well known on the station and long remembered against her.

Jebsen was obviously a willing party throughout to the assistance that was being arranged for the *Leipzig*, and no doubt the proceedings were concerted with the *Leipzig's* officers, for otherwise they might have proved abortive. There is, however, no ground for supposing that the *Mazatlan* was under the orders of the *Leipzig* or was otherwise connected with her than as rendering the service of placing coals and other things where she or the *Marie* could get them, and as volunteering information, of which it was hoped that she would make use. Had the *Mazatlan's* character been Mexican, as her legal ownership was, what she did would have been a highly unneutral service. It is, however, a totally different thing to establish that these proceedings, which prima facie were those of a private merchantman, though controlled by a person of accommodating and zealous disposition, really prove that she was a ship which could not be transferred to neutrals at all during the war, any more than a German man-of-war or a mail-steamer owned by the German Government or any other portion of the public property of the German Empire destined to its public use: *The Parlement Belge.* (1) It must be possible to draw a line between unneutral service and " fleet auxiliaries " and between the cases in which neutrals can validly buy and take delivery of enemy ships and the cases in which they cannot ; otherwise transactions which are expressly permitted to neutrals might be invalidated by circumstances of which they had no notice and could form no estimate.

That a vessel which is or has been a portion of the armed forces of a belligerent cannot by a mere private transaction be placed beyond the reach of capture on the high seas is well

(1) (1880) 5 P. D. 197.

settled (*The Minerva* (1); *United States* v. *The Etta* (2); *The Georgia* (3)), and there is authority for the proposition that while a vessel formally incorporated in the enemy forces is and continues to be, for this and cognate purposes, a public ship of war, her mere actual employment in that capacity without formal incorporation or commission will also bring upon her the like disability (*The Ceylon* (4) and cf. *H.M. Submarine E* 14 (5)). Various reasons have been given for this rule, as that transferability is an exception granted to enemy property in favour of commerce and that ships of war are not articles of commerce, or that such transfers would enable a belligerent to rescue himself from the disadvantage into which he has fallen and so to shift the disadvantage to his opponent, or that the ship sold might afterwards find its way back into the service of the flag to which she had belonged. If a public man-of-war remains in a neutral port for more than the limited time permitted to her by recognized rules, she has to be interned, for otherwise the neutral State would be rendering an indirect service to a belligerent as such. If it were open to a subject of that State to buy her under such circumstances, the payment of the price would be a direct service to the belligerent of a very real character, for instead of a ship which he could not use, he would get cash, which he could. The precise foundation of the rule, however, need not now be determined.

In the case of a ship which is not and never has been a part of the armed forces of a belligerent, other tests may be applicable. Ships which enlist in the service of such armed forces, though not armed themselves, may naturally be the subject of rules more stringent than those which govern ordinary merchantmen. The forces assisted may consist of single ships or of whole fleets. Assistance may be rendered when in company or when detached; it may consist in the supply of coal and stores, or in the collection and forwarding of information. An unarmed ship may be of service as a decoy

(1) 6 C. Rob. 396.
(2) 4 Am. L. R. (N. S.) 387.
(3) (1868) 7 Wall. 32.
(4) 1 Dods. 105.
(5) [1920] A. C. 403.

J. C. 1921 THE EDNA.

or as a screen; the assistance may be rendered casually or on a system, voluntarily or under orders, gratuitously or for hire. Such service is not necessarily confined to ships of the country to which the fleet assisted belongs or of a country engaged in the war at all. Again, such a ship may be captured in delicto and while rendering the service or after the service has come to an end. In the latter case different considerations may well arise, unless she is to be clogged perpetually for a single transgression and be incapable of valid transfer however long she may have mended her ways.

There seems to be no authority in point. Their Lordships considered the case of *The Alwina* (1) as one of the carriage of contraband only. The neutral vessel there was released and not treated as if she were a fleet auxiliary, although it was not disputed that the ship and her cargo had been despatched with the object of succouring a German squadron at sea, and if no services were actually rendered this was due to circumstances equally unforeseen and unwelcome, so far as her Dutch owners were concerned. The case, however, at most throws light on the liability of such an assistant to be subsequently captured while in the same ownership, and does not purport to decide anything as to the validity of an intervening change of ownership.

So much for the character of the assistance, which is material. Regarding the *Mazatlan* as a ship of enemy character, those in command of her nevertheless held no personal commissions from the German Government; she was not even such a "private ship of war" as was commissioned in the days of privateering; she took no direct part in hostilities; it is not shown that she was under the orders or control of any agent placed on board by the enemy Government; she was not even in the employment, still less in the exclusive employment, of such Government; she was not under requisition to them; she did not fly the colours of the German Navy, nor were her crew subject to military law. Regarded as a vessel on the Mexican register she had no immunity from visit and search or from arrest by appropriate legal proceedings in a municipal

(1) [1918] A. C. 444.

Court, say of the United States, nor in such proceedings could the German Government, if they had chosen to submit to the jurisdiction, have been made liable for private civil wrongs done by those on board of her.

Their Lordships are not prepared to entertain a proposition so wide as that any help whatever rendered to a German man-of-war by a German merchantman would disable her owners from validly transferring ownership to a neutral under all circumstances for the remainder of the war. Such a proposition would go far to make the term "unneutral service" a mere name and to enhance to a surprising extent the consequences hitherto imposed on that form of misconduct. The communication to the *Leipzig* of the movements of British vessels by wireless telegraphy, in itself one of the gravest of offences, rested in intention only; the achievement was frustrated, and mere intention without more cannot in principle be followed by any such disabling consequence. Furthermore, the services actually rendered were confined to what passed at Ballenas Bay and at Guaymas, and were put an end to at any rate by the requisitioning of the ship a little later on the same voyage.

It is probable enough that, if things had prospered with the *Leipzig*, Jebsen meant the *Mazatlan* to render similar services on future voyages, but such services would be most usefully, because most unobtrusively, rendered by a peaceful merchantman continuing her regular voyages under the Mexican flag. Besides, whatever the title "fleet auxiliary" may mean, it seems to fit the *Marie* better than the *Mazatlan*, and Jebsen may have thought that in exposing his relative's ship to peril he had done enough. Two "fleet auxiliaries" were not needed nor was it indispensable that the *Mazatlan*, having once engaged in such services, should be always so engaged. With the *Marie* serving as a link between the *Leipzig* and the shore, it might well be safest to employ now this ship and now that, as opportunity served, to bring the required cargo to the appointed rendezvous.

Their Lordships have accordingly come to the same conclusion on this point as the President. Though the captors had

J. C. 1921 THE EDNA.

a case of substance, affording ground for inquiry, they did not show that the *Mazatlan* could not be validly sold to the claimants at the time when she was transferred.

In the alternative, the captors allege that the sale was one which, if not incompetent, yet ought not to be sustained. It is said that such a transaction must be tested by the state of mind in which it is conceived and carried through, and that in the nature of things the relevant state of mind is that of the transferor. The transferee's mind may be honest and yet the impropriety of the transferor's motives may defeat the whole transaction. For this authority is sought in art. 56 of the Declaration of London as being a considered and correct formulation of the law of nations on the point. Articles 55 and 56 deal with transfers of enemy ships before and after the outbreak of war respectively. In the first case the transfer of an enemy ship is declared to be valid, unless it is proved to have been made in order to evade the consequences to which as an enemy ship the outbreak of war would expose her. In the second the transfer is declared to be void, unless it is proved that it was not made in order to evade those consequences. Transfers are effected by the combined action of two parties, the seller and the buyer, and the word "evade" suggests something more than "escape," for the latter is a result, while the former is a means by which a result is brought about. These considerations, coupled with the fact that art. 56 is linked with art. 55, point to the conclusion of Lord Sterndale that the article deals only with colourable or fictitious transfers, devised by both parties in combination. If, then, as the learned President thought, art. 56 does not conflict with the decision of this Board in *The Baltica* (1) it does not affect the present case, for, apart from the burden of proof, which does not now matter since the evidence is complete, there was an actual transfer, not colourable nor subject to any reservation, and this in the case of a private merchantman is sufficient when completed by delivery. The contention, however, is that the claimants have to prove that the transfer was made by the transferor, the person who

(1) 11 Moo. P. C. 141.

makes it, otherwise than for the purpose of evading capture and condemnation. If this construction is the true one, the article very considerably alters the law as laid down in decisions which bind or have been accepted by this Board, and the alteration is an enhancement and not a waiver of belligerent rights. If pressed to its logical results, it would in practice invalidate most transfers to neutrals, for how could a neutral command the evidence of his transferor, who alone could make a clean breast of his motives and objects in entering into the transaction ? If the enemy's testimony were not forthcoming, how could it ever be inferred from circumstances alone that among the many objects with which men sell their chattels, the object of escaping the harassing peril of capture may not have been one ? If, on the other hand, that evidence was given, what is the state of facts in which any Court would believe that the vendor was wholly innocent of such a desire ? It is better to adhere to the settled rules laid down in *The Ariel* (1) and *The Baltica*. (2) Of course, a vendor may be shown to be so interested in getting rid at all hazards of the appearance of ownership as to lead to the conclusion of fact that he really did what he was most interested in doing, and shed the apparent title while retaining the property. A Court would then hold that there was no real sale, not that the sale was real and effectual, but that the vendor's reprehensible state of mind caused the buyer to lose the ship for which he had paid his money. The article is in all probability an endeavour to find an acceptable compromise between English and Continental views on the point, and if so, is not an authority to be followed now.

The claimants, on the other hand, contend that it is the state of mind of the buyer that alone can matter. If he honestly intends to buy and does buy, the seller's reasons for selling are immaterial. He has his reasons or he would not sell, but what they are is of no consequence. This again will not do. To say that no regard need be had to the mind of the seller goes too far. No doubt, when once the question, whether the sale is a real sale, is answered in the affirmative, the prior

(1) 11 Moo. P. C. 119. (2) 11 Moo. P. C. 141.

J. C 1921 THE EDNA.

motives and objects of both parties become merely antecedent and preliminary matter, but in ascertaining how that question is to be answered great light is thrown on the transaction by considering the situation of both parties, so as to test what they purported to do by what they must really have intended. Plainly, however, the mere fact that to uphold the sale might prevent the Crown from obtaining a condemnation cannot affect the matter, for that would mean that a judgment upon a question of fact should be given one way or another, according as the upshot affected the interest of the British Crown.

In the present case it is now clear that what the claimants meant to do was what they purported to do—namely, to buy the ship without reservation, and what they did was to perform their part of the contract so made by paying the price and taking delivery. Beyond the fact that they changed her name, a circumstance immaterial as things stand, though had other facts been proved against them it might have had some importance, nothing has been done on their side to raise any doubt against them. The ship was not left in Jebsen's service or at his disposal, but was chartered to third parties for account of the claimants. Their evidence is that when they bought her they had heard nothing of the earlier adventures of the *Mazatlan*. On Jebsen's side there were circumstances which give rise to much suspicion, but it is now accepted that the claimants had no cognizance of or participation in them. Their Lordships are of opinion that the evidence, viewed as a whole, disclosed no ground on which it could have been held that the *Edna* was, when captured, still a ship of enemy character. There is no other way in which the captors' appeal can be supported. The interval which elapsed between the carriage of contraband and the conduct, which in a vessel of neutral character would have been unneutral service, and the capture of the *Edna*—namely, from the autumn of 1914 to January, 1916, would have been too great and the change of circumstances too complete to support a condemnation, if the *Mazatlan* were regarded as not being of enemy character in 1914. As, however, her enemy character down to the

sale to the claimants in 1915 is not now in dispute, the whole question turns on the validity and on the competence of the sale. In their Lordships' opinion the appeal fails.

The cross-appeal depends on the question whether there was adequate ground for seizing the *Edna* and pressing the claim for her condemnation till the trial. All the proceedings were in themselves regular. The ship was requisitioned pursuant to the rules, and it is not suggested that the case was persisted in for the purpose of prolonging the period of profitable requisition. Their Lordships cannot regard so improper a course as anything but a theoretical possibility, which in the present case has, fortunately, not even been discussed.

The law relating to claims for costs and damages against captors was fully stated by their Lordships' Board in *The Ostsee* (1), when all the authorities were considered. There no question of the reality or validity of a transaction or of its good faith arose, and against the ship and her conduct and that of her owners, who had been her owners all through, nothing was alleged. The ground given for seizing her, in fact, did not exist, and it was held that the actual captors' honest belief that it did could not by itself serve as a probable cause for seizure. Here the acts of the ship, which are relied on, were real enough, though they ceased before the title of the claimants arose and without their participation or knowledge, but they are material to the critical question whether the ship could validly be seized. It was suggested that in the present case the seizure was due to the captors' mistake of law—namely, as to the nature of those public ships of war which are not transferable during war ; while in *The Ostsee* (1) it was due to the captors' mistake of fact—namely, as to the issue of a proclamation of a blockade, and that equally in either case the owner of the ship captured should not suffer for their mistake. This is really fallacious. On the question of the existence of the blockade there was nothing to be inquired into ; on the question what the character of the *Mazatlan* was, her undisputed action raised a real subject

(1) 9 Moo. P. C. 150.

J. C. 1921 THE EDNA.

for inquiry. There can be no doubt that when the ship was taken, those, at any rate, who directed the action of the cruiser, had substantial ground for questioning her neutral or her private character. She had been so employed on the voyage above described as to justify inquiry, and after the first and before the second requisitioning by the Mexican authorities she was sent on another voyage along the same coast. Either requisitioning might under the circumstances have been really not unwelcome to her owners, for, till things had blown over, it would afford an unobtrusive seclusion for a ship that had earned for herself a certain amount of evil notoriety. The termination of this retreat was quickly followed by a transfer to the United States Registry, and an intercepted letter revealed the fact that a German Government official had forwarded to Germany part of the purchase money paid for her. It is quite impossible to say that there was not probable cause for supposing that she had been a German "fleet auxiliary" and so was liable to seizure with a view to condemnation.

It has long been assumed as good law that captors can rely at the trial on facts unknown to them at the time of capture (*The Elize* (1)), nor did the respondents attempt to contest this. The evidence as it developed showed much that was provocative of doubt and suspicion. The financial circumstances preceding and attending her sale showed a reasonable case for believing that Jebsen was engaged in creating a screen of United States intermediaries between himself and the actual buyers, such as would disarm the suspicions or defeat the investigations of a captor and make it possible to find a complaisant neutral, who would willingly and successfully act for his protection. Even when the claimants came to give their own account of the matter on affidavit, they did not explain away this mystification, but only disclaimed participation in it. It is true that they proved actual payment of the price, but cross-examination might prove that they had a greater connection with Jebsen's acts than was consistent with good faith or the reality of the sale. The captors might

(1) (1854) Spinks, 88.

well desire to have their evidence given orally in open Court. Furthermore, although the oral evidence given in 1919 ultimately confirmed the account of their conduct which the claimants had given in affidavits before the end of 1916, they also put forward numerous other affidavits so flagrantly false that the learned President expressed his surprise at their using them at all. Instead of contenting themselves with a completed title as neutral buyers and with proving their independence and ignorance of the *Mazatlan's* earlier proceedings, they advanced a case, which was really Jebsen's case, and was untrue. The captors could not be expected to sift out the false affidavits from the true and apply for the release of the ship on a case better than that which, as a whole, the claimants made for themselves. Those who put forward a case of which so large a part was disingenuous, must not complain if the whole of it, with their own oral evidence, was submitted to the judgment of the learned President, as a matter which only the Court could decide. It is true that he states that he arrived at his conclusion in favour of the captors with much doubt, though his examination of the facts was careful and thorough. It is not necessary for their Lordships to indicate whether they have shared his doubts or not. If it were so, that would be no reason for reversing his decree. Similarity of doubt is not a ground for dissimilarity in conclusion. The allowance of damages and costs is largely a question of discretion, which in past times has but rarely been answered unfavourably to captors, and it is enough to say that their Lordships see no sufficient reason for differing from his opinion.

The claimants further indicated a somewhat singular argument—namely, that the *Edna* should not have been detained at all, for her papers were in order, nothing on board of her or connected with her then ownership or employment awakened any just suspicion, and those who seized her are not shown to have had at the time any knowledge of such circumstances of suspicion as have since been elicited on a scrutiny of the evidence. Their Lordships think that such a contention unduly narrows the right and utility of seizure

J. C. 1921 THE EDNA.

as a preliminary to trial and condemnation. Even under the old practice the allowance of further proof rested in the discretion of the Court. It is true that it was not the practice to exercise that discretion in favour of such an order under the circumstances prevailing in the wars at the end of the eighteenth and beginning of the nineteenth centuries. The likelihood of further evidence of value being obtainable was so small in proportion to the delay that it would involve, as to disincline the Court to allow a more remote investigation than the examination of the ship's papers and the administration of the standing interrogatories already provided for. Now, however, under modern conditions, when the facilities for ascertaining the truth by subsequent investigation and the introduction of various kinds of evidence make even a considerable delay so well worth incurring, it can hardly be doubted that the same judges would have freely exercised their discretion in the contrary direction. This would be peculiarly so if the question in debate were the validity and genuineness of the ship's apparent nationality. If inquiry on such a subject were to be limited to the regularity of her papers and register, it would not be worth while to embark upon it, for nowhere would it be less likely that captors would find proof of or even ground for suspecting the unreality of a transfer to a neutral flag than among the formal documents required to protect and conceal it. Unless search after the truth is to be abandoned in such cases or denied altogether, it must follow that, on grounds wider than the mere practice of the Prize Court as settled under the authority of the present statute, captors are entitled to justify detention of a ship, even though she is ultimately released, on grounds only made apparent upon an examination of subsequent evidence given on either side.

The conclusion therefore must be that on no ground are the captors liable in damages or costs. The claim for something in the nature of an account of profits earned by the use of the vessel while under requisition is equally unsustainable. There is no theory of the relations between captors and claimants, still less between His Majesty, for whose use the

ship was requisitioned, and the shipowners, which would support a claim of such a kind. No issue has been raised as to unrepaired injury sustained by the ship : the claim, if any, must be for damages and costs only. It is right to recognize that a result which restores the ship to her owners but leaves them without recompense of any kind for the loss of the use of her between 1916 and 1919 must be profoundly disappointing to them, and may seem to be not without some suspicion of paradox in law. It would be unsatisfactory that so long a time should have elapsed before this cause could be brought to an issue, were it not that the claimants do not seem to have taken any active steps to accelerate it and may well be supposed to have recognized that the delay was one which they could not fairly complain of. It is to be hoped, however, that, whatever the conditions of future wars may be, this case may never be regarded as anything but highly exceptional in this particular.

Their Lordships will humbly advise His Majesty that both the appeal and the cross-appeal should be dismissed with costs.

Solicitor for Procurator-General : *Treasury Solicitor.*
Solicitors for Claimants : *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.*
1921
March 16.

THE PRINS DER NEDERLANDEN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Carriage of Contraband—Allowance of Freight.

The Prize Court has jurisdiction to award freight in respect of the carriage of contraband goods, but the discretion to do so is exercised only in wholly exceptional cases. Its allowance or disallowance does not turn merely on the question whether the shipowner knew the character of the cargo.

In the present case their Lordships held that ignorance of neutral shipowners as to the enemy destination of the contraband goods, their conduct in informing the British authorities of the proposed shipment, and their services in carrying the goods from Las Palmas, were not sufficient grounds, in accordance with the authorities, for an exercise of the discretion in their favour.

Judgment of the Prize Court reversed.

APPEAL from a judgment of the Admiralty Division (in Prize) dated March 31, 1920. (1)

The appeal was by the Procurator-General from an order of the President (Sir Henry Duke) awarding freight to the respondents, neutral shipowners, in respect of the carriage of 1780 bags of cocoa shipped in the steamship *Prins der Nederlanden* and condemned as contraband having an enemy destination.

The facts appear from the report of the proceedings at [1920] P. 216. The steamship *Lapwing* referred to at the end of their Lordships' judgment was the vessel by which the cocoa was returned from Amsterdam to London, the respondents paying the freight.

1921. Jan. 18. *Sir Gordon Hewart A.-G., Branson* and *Harold Murphy* for the appellant, the Procurator-General. A neutral shipowner is not entitled to an award of freight in respect of the carriage of contraband, whether or not he knew that the goods carried were contraband. That rule

* *Present:* LORD SUMNER, LORD PARMOOR and SIR ARTHUR CHANNELL.

(1) [1920] P. 216.

was recognized and applied by Sir Samuel Evans P. in *The Jeanne* (1), after a discussion of the authorities. In *The Neptunus* (2), in which an award of freight was made, only a very small portion of the cargo was contraband; so far as the award was in respect of that portion it was as a matter of grace and on the principle "De minimis non curat lex."

[Reference was also made to *The Commercen* (3); *The Ringende Jacob* (4); *The Mercurius* (5); *The Neutralitet* (6); *The Jonge Tobias* (7); *The Peterhoff* (8); Story on Prize Courts (Pratt's ed.), pp. 92, 93; Observations of Drafting Committee, Declaration of London, art. 41. (9)]

If there is jurisdiction to allow freight, it is exercised only in very exceptional circumstances; the shipowner's ignorance of the character of the cargo is not in itself a ground. But in this case knowledge should be imputed to the respondents. They knew that the goods had originally been shipped in a German ship for Germany, and the delivery at Las Palmas was effected by a German agent. Further, on the true construction of the contract of affreightment the shippers remained liable for the freight. In any event no freight should be awarded for the return of the goods to London; the completion of the voyage to Amsterdam was allowed for the convenience of the respondents.

Dunlop K.C. and *Darby* for the respondents. The authorities already referred to establish that freight is allowed when it is fair and equitable in all the circumstances of the case to allow it. That rule was adopted by Sir Samuel Evans P. in *The Juno* (10) and *The Corsican Prince.* (11) Those were cases of non-contraband cargoes, but they show the basis upon which freight is allowed and estimated. In exercising this discretion, ignorance of the shipowner of the character of the cargo, and his conduct relative to the captors, are most

(1) [1917] P. 8.
(2) (1800) 3 C. Rob. 108.
(3) (1816) 1 Wheat. 382, 394*n*.
(4) (1798) 1 C. Rob. 89.
(5) (1799) 1 C. Rob. 288.
(6) (1801) 3 C. Rob. 295.
(7) (1799) 1 C. Rob. 329.
(8) (1866) 5 Wall. 28.
(9) Manual of Emergency Legislation, p. 490.
(10) [1916] P. 169.
(11) [1916] P. 195.

J. C. 1921 THE PRINS DER NEDERLANDEN.

material factors: *The Manningtry* (1); *The St. Helena.* (2) In *The Brita Cœcilia* (3) and *In re Naval Stores Ships* (4) freight was allowed, although its allowance was contested. It was not held in *The Jeanne* (5) that there was no discretion to allow freight even if the goods were contraband. The facts in the present case are wholly different from those in that case. [Reference was also made to *The Hakan* (6) and *The Emanuel.* (7)] The terms of the contract of affreightment are not material. It is not correct to say that the carriage of the goods from Amsterdam was for the benefit of the respondents.

Branson in reply. The two cases cited from Hay & Marriott's Reports were cases of pre-emption; the question whether or not the goods were contraband did not arise. In the cases in which during the late war freight was allowed for the carriage of condemned goods the goods were enemy goods. The position of a neutral ship carrying contraband goods is distinguished in *The Juno* (8), the right to freight being denied.

March 16. The judgment of their Lordships was delivered by

LORD SUMNER. In this case the Procurator-General, having obtained a decree for the condemnation of cargo as contraband, appeals against the President's allowance of freight on it to the Koninklijke West Indische Maildienst, the owners of the carrying vessel the *Prins der Nederlanden.*

The allowance of freight for the carriage of contraband is undoubtedly very rare. Two reported cases only have been found in which it has been ordered: *The Brita Cœcilia* (3) and *The Neptunus.* (9) Other cases in Hay & Marriott in which freight was in fact given, appear to have been cases where the cargo was the produce of the shipowners' own country or cases of pre-emption of ship's stores for the use

(1) [1916] P. 329.
(2) (1915) 1 Br. & Col. P. C. 618.
(3) (1779) Hay & Marriott, 234.
(4) (1779) Hay & Marriott, 287.
(5) [1917] P. 8.
(6) [1918] A. C. 148, 152.
(7) (1799) 1 C. Rob. 296.
(8) [1916] P. 169 174.
(9) 3 C. Rob. 108.

of the Crown. In the first case nothing is recorded but the bare fact, in the other the allowance was made, though in argument the captors had contested its competence. It is, therefore, a decision in favour of the jurisdiction, and the circumstance that the contraband articles were but "in a small quantity amongst a variety of other articles" may have influenced the learned judge, but more probably as the ground on which he exercised his discretionary jurisdiction in favour of the ship, than as the test for deciding in which cases such a jurisdiction is exercisable at all. Certainly *The Neptunus* (1) is not, as the appellant argued, a mere instance of "De minimis non curat lex." During the present war Sir Samuel Evans recognized the existence of such a discretionary jurisdiction in *The Jeanne* (2), but he did not exercise it. The cases of condemnation of contraband goods, where the reports expressly state that the ship lost her freight, are very numerous, and as long ago as *The Sarah Christina* (3) in 1799, "I shall content myself," Sir William Scott says, "with the restitution of the ship, withholding, as usual on the carriage of contraband, the allowance of freight and expenses"—a mode of expression which seems to suggest the exercise of a discretion to withhold what he had jurisdiction to allow (see too *The Ringende Jacob* (4) and *The Neutralitet* (5), and Mr. Wheaton's note to *The Commercen* (6) observes that on the carriage of contraband "freight is almost always refused" in British Courts. This is stated, too, as the standing rule in works of authority such as Pratt's Story, pp. 92, 93; Hall's International Law, Pt. 4, ch. 5, and Holland's Prize Law, § 83. The first even states that the shipowner "is never allowed freight . . . . upon the carriage of contraband goods, nor where there has been a spoliation of papers," which is probably a mere statement of the practice, not a proposition as to jurisdiction. Of course, if goods have only been made contraband during the voyage, the shipowner may be in a different position.

(1) 3 C. Rob. 108.
(2) [1917] P. 8.
(3) (1799) 1 C. Rob. 237, 242.
(4) 1 C. Rob. 89.
(5) 3 C. Rob. 295.
(6) 1 Wheat. 382, 390*n*.

J. C. 1921 THE PRINS DER NEDERLANDEN.

In the present case the Procurator-General's argument denies such a jurisdiction altogether and contends that in the case of contraband any allowance of freight is incompetent; if so, *The Neptunus* (1) was wrongly decided and in *The Sarah Christina* (2) Sir William Scott understated the law. No authority in support of the point is forthcoming.

The theory on which, in any case, a Court of Prize allows to carriers a freight on cargo condemned is not very consistent or logical. It is plain that when it does so at the expense of captors, it is not on the footing of any prior obligation legally binding upon them. They have entered into no contract: they have made no request for services to be rendered; there is, so far as they are concerned, no promise to pay, express or implied. When they bring in the ship and claim condemnation of the goods carried they act wholly ex adverso towards the carrier, and solely in the exercise of superior belligerent rights. By placing the goods in the marshal's hands they determine the carrier's lien, and the issue of a decree of condemnation, at any rate, involves the frustration of the voyage. On the other hand, the carrier's personal contract with the shippers or other parties, who are liable to pay freight, either subsists and may be enforced or is determined by the inability of the carrier to bring the goods to the agreed port of discharge and there deliver them, an inability in respect of which he has no legal rights or grievance against the successful captor. Whether his inability to sue for freight arises because his contract, or the law applicable to it, provides for payment of freight only on the completion of the voyage and right delivery of the cargo, and does not provide for freight pro rata itineris, or whether his inability to obtain it is caused by his having lost his lien and so having no possessory right to enforce or to release against good consideration, it arises at any rate from acts, which, so far as the captors are concerned, give him no right to damages, when they are followed by a decree of condemnation.

It is said that the carrier has enhanced the value of the goods

(1) 3 C. Rob. 108. (2) 1 C. Rob. 237.

captured by bringing them to the place of capture, and that the captor should not be allowed to appropriate this enhanced value without payment. This, however, leads to no clear principle. It would be equally true and so it ought to be equally applicable, whatever the grounds for condemning the goods, whether the freight is prepaid or not, and whether or not the carrier has an available legal remedy against strangers. In fairness he might be deemed to receive it to the use of the party who has prepaid, or in satisfaction of the liability of the party who is still liable to pay, but these considerations merely go to the person to whom the compensation ought ultimately to be paid, and not to the propriety of saddling the captor with freight on the prize condemned in his favour. In all cases, if the prize was condemned freight free, the captor would be getting something for nothing, and if so, on this view, he ought to pay in all cases, even in cases of contraband or of prepaid freight, and the measure of his payment would be the increased value of the goods, if any, and not, or not merely, a fair return to the shipowner for the carriage performed. If the allowance of freight on goods condemned rests on the view that the captor is getting something of value from the carrier, what distinction is there between cases of contraband cargo where freight is refused and cases of capture of enemy property, not contraband, where it is allowed? : *The Emanuel* (1); *The Commercen.* (2) In each case the value added to the goods by the carriage is added by conduct on the carrier's part, which is not wrongful in itself, though the belligerent has the right to interrupt and prevent it.

On the other hand, ignorance (a term perhaps more appropriate than innocence, both to the occupation of shipowning and the carrier's actual relation to the carriage of contraband) would become a highly material consideration, if disallowance of freight on contraband rests truly on the theory of its being a penalty. Nevertheless the contrary has been held: *The Oster Risoer.* (3) If the penalty is inflicted for the commission

(1) 1 C. Rob. 296. (2) 1 Wheat. 382, 387.
(3) (1802) 4 C. Rob. 199.

J. C. 1921 THE PRINS DER NEDERLANDEN.

of an offence, proof of bona fide ignorance of the facts constituting the offence surely merits an acquittal. It is suggested that in this connection the present respondents were put on inquiry, because a German steamer had brought the cocoa to Las Palmas and a German agent looked after the transhipment there, and because the original voyage, on which the cocoa was shipped before the outbreak of war, was to Germany, though owing to the war it had been discontinued. It seems to their Lordships that these circumstances would, if anything, rather lull than excite suspicion in the respondents of a substituted transit to Germany to be effected by getting the cocoa taken in the *Prins der Nederlanden* to a Dutch port, and there consigned to the Netherlands Overseas Trust.

The term penalty, however, though often mentioned (e.g. in *The Commercen* (1)), is not in this connection really one, which implies that the carriage of contraband is attended with the usual incidents of the commission of an offence. Neutrals who carry contraband do not break the law of nations; they run a risk for adequate gain and, if they are caught, they take the consequences. If they know what they are doing, those consequences may be very serious; if they do not, they may get off merely with some inconvenience or delay. This must suffice them. Having done their best to aid one belligerent by carrying contraband for him, they cannot ask that the other shall pay the penalty for his own success in defeating the attempt by rewarding the neutral carrier as if his venture had succeeded. That would be to encourage the carrying of contraband, whereas it is a thing to be deterred. Nor should ignorance of what he is doing be a safeguard to the carrier. If he is to be deterred, it must be made worth his while to know, in order that he may prefer to abstain.

It seems, therefore, to follow that, when freight is allowed, it is from the Court's view of fair dealing towards parties whose conduct is open to blame, and it is refused in order to protect the effectual exercise of belligerent rights. Reasons of this kind seem founded rather in policy and discretion

(1) 1 Wheat. 382, 394.

than in legal rule and legal right. There are many passages to be found in the reported decisions, which point in this direction. Thus if a neutral vessel is captured with enemy cargo she is discharged with full freight; "no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo": *The Fortuna.* (1) "This rule was introduced for the benefit of the shipowners, and to prevent the rights of war from pressing with too much severity upon neutral navigation": *The Prosper.* (2) On the other hand, Sir William Scott speaks of the whole law of contraband as a matter of the practice of the Court (*The Jonge Tobias* (3)), and implies that although the Court can relax, and has relaxed its practice in other directions in this respect, it will introduce no alteration (*The Sarah Christina* (4)), or only in very special circumstances: *The America.* (5) Some difficulty, it is true, may be felt on the other side. The allowance of freight may be very fair to the neutral shipowner, and yet quite the reverse for the captors, at whose expense the freight will be found, whether charged on the proceeds of the prize or directly decreed against them. If captors have the right to prevent the cargo from reaching its destination, why must they pay for the exercise of that right; why is not capture and condemnation to the neutral carrier what perils of the sea are, a risk of the adventure? For practical purposes it is enough to say that such is the law of nations, as administered in Courts of Prize; but the theory of it must be that the Court, endeavouring to hold an even balance between belligerent rights and the rights of neutral trade, requires that the captors' windfall shall suffer some abatement under circumstances of legitimate carriage and will only adjudge the res in its hands to those who, in placing it there, have submitted to its jurisdiction, after fair consideration for those who lose by mere misfortune and without fault. Now a jurisdiction to do what is fair in the circumstances of

(1) (1809) Edw. 56, 57.
(2) (1809) Edw. 72, 76.
(3) 1 C. Rob. 329.
(4) 1 C. Rob. 237.
(5) (1800) 3 C. Rob. 36.

J. C. 1921 THE PRINS DER NEDERLANDEN.

a given case is essentially a jurisdiction which is discretionary in its exercise. Long practice now forbids that discretion to be exercised so as to deprive shipowners of freight which has long been regularly allowed to them; but it is still open to the Court to make a discretionary allowance when circumstances are wholly exceptional.

On this reasoning their Lordships find it impossible to accede to the contention that there is never any jurisdiction to allow freight on contraband goods condemned. Not only would this overrule *The Neptunus* (1) and falsify sundry passages which describe the disallowance of freight as usual, not as inevitable, but it would be inconsistent with the theory that the claim for freight rests rather on an appeal to the Court's duty of protecting neutrals than on a liability in the captors. Their Lordships are not minded to disclaim a jurisdiction, which may enable a Court of Prize to secure to neutrals in suitable cases a return for work done in the way of their trade and without circumstances of disregard of neutral obligations in the course of it.

At the trial the Procurator-General did not prove that the shipowners had any knowledge of the destination of the cargo, though there is some difference of opinion whether he admitted that they had none. The President was evidently satisfied that they were ignorant of it, and upon this and upon the advantage derived by the captors from the carriage of the goods, he decided to exercise his discretion in favour of allowing freight. Before their Lordships the claim put forward by the shipowners was a far-reaching one, for they claimed a right to freight, unless it could be shown against them that they knew they were carrying contraband. If so the owner of a general ship would rarely lose his freight, for captors could seldom hope to bring such knowledge home to him, considering how numerous and often how small are the separate parcels shipped, and in what haste they are often taken on board. In cases of continuous voyage a similar difficulty would arise even for entire cargoes, and such a rule would in the case of cargoes wholly or mainly contraband

(1) 3 C. Rob. 108.

leave no middle term between forfeiture of the ship and release of it with an allowance of freight. It is not too much to require that shipowners should know both the contents of belligerents' proclamations as to contraband and the descriptions of the goods entered in their own manifests. How it might be, if contraband articles were fraudulently concealed in seemingly innocent packages or disguised by the shippers under a plausible misdescription, need not now be decided. The shipowner always has the remedy in his own hands, if he requires his freight to be prepaid, and the general practice in the late war to do so shows how available such a remedy is. Their Lordships, therefore, think that the exercise of a discretion to allow freight on contraband ought not to turn merely on the question whether the shipowner knew or did not know the character of his cargo, still less that proof of his ignorance should be treated as a title to a decree for freight.

In the present case the shipowners rely, in addition to their ignorance, upon the candour with which they facilitated the task of the detaining officers, by giving early and regular notice of the parcels they were bringing forward from their different ports of call. Certainly their Lordships would not wish to belittle the assistance which such practices, if widely adopted, would give to the capturing power ; but it would be idle not to observe that these timely intimations principally served to minimise delay to the line of steamers concerned, and to promote good relations between their owners and the British Government. Their Lordships are unable to find, either in this course or in the respondents' ignorance, or in their meritorious service in carrying the cargo to the place where it was captured, or in the combination of these circumstances, a sufficient foundation upon which, in accordance with the current of decisions, a discretion in favour of allowing freight could properly be exercised, and they therefore think that the learned President's decision was wrong. Having come to this conclusion, their Lordships think it undesirable to endeavour to indicate what circumstances would have justified an allowance of freight. As the question is essentially one of discretion, this ought to be decided in each case in the

J. C. 1921 — THE PRINS DER NEDERLANDEN.

first instance by the judge of the Prize Court on the circumstances as they arise before him. It also makes it unnecessary to examine at length the two subsidiary points as to the freight on the return voyage by the *Lapwing* or the argument derived from the alleged continuing liability of Onnes and Son. As to the first, they think that the *Lapwing* brought back the goods to England as part of an arrangement to avoid delay to the *Prins der Nederlanden*, and therefore for the benefit of the respondents. The overcarriage and return of the cargo could not benefit the captors. In no case, therefore, would they allow the *Lapwing's* freight. As to the second, even if Onnes and Son are still under a liability for freight, the circumstance seems to be irrelevant. If the captors ought to pay, it does not release them from liability that discharge of their obligation may prove an advantage to these very undeserving persons. On the other hand, viewing the refusal of freight as a matter of penalty, no one can regret it, if the shipowners prove to be able to mitigate the effect of it by enforcing a liability on Onnes.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed with costs, and that the decree made by the learned President should be set aside.

Solicitor for appellant : *Treasury Solicitor.*
Solicitors for respondent : *Pritchard & Sons.*

[PRIVY COUNCIL.]

THE NORNE.

J. C.*
1921
March 16.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Contraband—Enemy Destination—Onus of Proof—Public Auction in neutral Country.

Proof of an intention to submit conditional contraband goods to public auction in the neutral country to which they are shipped does not necessarily discharge the onus of proving that they are not destined for an enemy Government or an enemy base of supply.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) dated February 13, 1920. (1)

The appeal was by neutral claimants against a judgment of the President (Sir Henry Duke) condemning consignments of oranges by the steamship *Norne*, and other ships, on the ground that they were conditional contraband goods destined for an enemy base of supply. The facts appear from the judgment of their Lordships.

1921. Jan. 20, 21. *Sir Erle Richards K.C.* and *Darby* for the appellants.

Sir Ernest Pollock S.-G. and *Sir Harold Smith* (*Sir Gordon Hewart A.-G.* with them) for the respondent, the Procurator-General.

On behalf of the respondent reference was made to *The Urna* (2); *The Noordam* (3); and *The Kronprinsessan Margareta.* (4)

March 16. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellants are an import and export company claiming on behalf of Enrique Rubio, who was the shipper and consignor of certain boxes of Valentia oranges seized on the Norwegian steamships *Norne*, *Grove* and

* *Present:* LORD SUMNER, LORD PARMOOR, and SIR ARTHUR CHANNELL.

(1) Unreported.
(2) [1920] A. C. 899.
(3) [1919] P. 57.
(4) [1921] A. C. 486.

J. C. 1921 THE NORNE.

Hardanger, during December, 1915, while on voyages from Valentia, in Spain, to Rotterdam, in Holland. The amount involved is not considerable, but it was stated that the case had been selected as a test case which would govern a number of other cases.

The first point raised on behalf of the appellants is that the ship's papers in each case disclose a consignee who has the real control of the goods, and that therefore the seizure comes within the protective provisions of the Order in Council of October 29, 1914. If this contention can be maintained the appellants would succeed. The consignee named in the bill of lading covering the oranges shipped on the *Norne* was J. de Graaf, and the consignee named in the other two bills of lading, covering the oranges shipped on the *Grove* and *Hardanger*, was Van Hoeckel. Both consignees were members of a syndicate composed of dealers at Rotterdam with the intention of importing fruit direct from Spain. The operations of this syndicate were controlled by an agreement of September, 1915, but in the view of their Lordships it is not necessary to express any opinion on the relationship created by the agreement between the syndicate and the constituent members, whose names were inserted as consignees in the bills of lading. In any event the syndicate is not the consignee named in the bills of lading, and therefore cannot be regarded as the consignee within the Order in Council of October 29, 1914. The true position of the parties appears to be accurately stated in the affidavit of Rubio sworn on July 13, 1918. He states that Schrevel and Co. were to arrange freight, space and insurance, and that the fruit shipped by him was to be sold on his behalf at Rotterdam by Schrevel and Co. on a commission of 5 per cent., that the bills of lading were signed by Enberg and Co., duly representing the captain of each ship, and that, by indication of Manuel Mas, who at that date was acting as agent for the syndicate in Valentia, they were indorsed to order of de Graaf and Van Hoeckel, genuine Dutch fruit firms associated with Schrevel and Co. for selling fruit on his account, and that all

fruit shipped in the three steamers was the property of the Spanish fruit exporters, no cases being sold to anybody, but being consigned on their account to be sold by auction at Rotterdam. The effect of this statement is that the boxes of oranges in question were consigned to sale agents in Rotterdam, whose authority—apart from any special provision—was revocable at any time by the consignor and shipper. Sale agents, whose authority is revocable by the consignor, are not consignees who have a real control of the goods consigned within the terms of the Order in Council of October 29, 1914: *The Urna*. (1) The result is that the contention of the appellants under the first head cannot be maintained.

At the date of the seizure the oranges had been declared conditional contraband. It is therefore for the appellants to prove that they were not destined for an enemy Government or an enemy base of supply. The question to be determined is whether they have satisfactorily discharged the burden which rests upon them.

It was suggested in the affidavit filed on behalf of the respondent that Enrique Rubio was not in reality a fruit dealer or exporter, but a shipping clerk in the branch house of a German firm. In his affidavit in reply of November 24, 1919, Enrique Rubio swears that he is not and never has been a shipping clerk, or employed as such, but that he had carried on business as a fruit merchant at Sagunto, in the Province of Valentia, since 1908. The learned President was satisfied that Enrique Rubio was a fruit grower and dealer, or a fruit grower only, and that there was a mistake in the suggestion that he was a mere pretended or invented owner of fruit who had come out of some mercantile office in order to figure as a consignor. There appears to be no ground to differ from this finding, and the respondent on the hearing of the appeal did not allege that Enrique Rubio was a pretended or invented owner of fruit.

It is not sufficient for the appellants to establish that Enrique Rubio was a Spanish fruit exporter who had no

(1) [1920] A. C. 899.

J. C. 1921 THE NORNE.

intention of sending his goods either to an enemy government or to an enemy base of supply. The voyage is not limited to that which a shipper of goods sets in motion. Whether goods in any particular instance are contraband, by application of the doctrine of continuous voyage, is a question of fact. Under the terms of the Order in Council the appellants must discharge the burden of proving that the destination, if the voyage had not been interrupted, would have been innocent. When an exporter ships goods under such conditions that he does not retain control of their disposal after arrival at the port of delivery, and the control but for their interception and seizure would have passed into the hands of some other persons, who had the intention either to sell them to an enemy government or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband. The case for the respondent is that the cases of oranges on arrival at Rotterdam would have passed under the control of Lutten and Sohn, of Hamburg, whose intention it was to send them to the enemy base of supply at Hamburg. The next question therefore to consider is whether this contention is established.

The learned President has found as a fact that Lutten and Sohn, of Hamburg, had a substantial part in the control of the business which was being carried on and a substantial interest in the transactions involved, which went beyond a mere commission of 10 cents per case upon oranges which might be forwarded; but the issue remains to be determined whether this interest was sufficient to give them control over the disposal of the cases of oranges and to determine Hamburg as the place of destination.

There seems to be no reason for not accepting the evidence, given on behalf of the appellants, as to the conditions under which the syndicate, referred to in the case as Schrevel and Co., was started. In 1913 a ring of fruit dealers interested in the fruit trade between Valentia and Rotterdam had a contract with the Royal Nederlands Steam Navigation Company, under which the ring were

entitled to all the space for fruit on the ships of that company, which owned the only direct line by which perishable goods could be carried direct from Spain to Holland. The syndicate, composed of fruit growers, was formed in February, 1913, to fight the ring, and with the intention of breaking the monopoly of the ring. In 1914 the syndicate endeavoured to import oranges into Rotterdam via London, but, owing to the perishable character of the fruit, it was not successful, and the syndicate ceased to operate in January, 1915. In the summer of 1915 the syndicate was reformed with the intention of importing fruit direct from Spain to Holland, and the operations of the syndicate were regulated under articles of partnership signed at Rotterdam on September 13, 1915. As early as August, 1915, the steamship *Norne* had been chartered for the purposes of the syndicate, and it is material to observe that this charter was arranged some time before Lutten took any part in the business. After the formation of the syndicate, Van Ronnen was sent out as agent of the syndicate to Spain. Subsequently this agency was terminated, and Manuel Mas was appointed in his place, who had acted for many years as agent for Lutten. There are a number of cablegrams which show that Van Ronnen objected to the transfer of the agency to Manuel Mas, but finally the matter was arranged. In September, 1915, Lutten had an interview with Hechterman at the town of Bentheim, in Germany. Manuel Mas was also present. No document containing any record of the meeting was found, but Mr. Lutten, on behalf of Lutten and Sohn, made proposals with regard to fruit import from Spain to Holland, and to the chartering for this purpose of a series of ships. The learned President accepts the statement of Mr. Hechterman that he did not bind himself at this interview to Mr. Lutten, and that whatever expectation Mr. Lutten may have formed, Mr. Hechterman kept himself free. At this time there were negotiations with the British Government on behalf of the syndicate that the vessels chartered by them and carrying fruit should be allowed to proceed direct to Holland with their cargoes. In October, the British Government refused this

J. C. 1921 THE NORNE.

request, and negotiations were resumed between Mr. Hechterman and Mr. Lutten. When Mr. Lutten was unable to import into Hamburg, owing to the war, he had a valuable connection in Valentia. The case of the appellants is that he sold his goodwill and agencies to the syndicate for a consideration, and that there was no arrangement which placed the oranges in the control of Mr. Lutten at Rotterdam so as to enable him to direct that they should be forwarded to Hamburg. The facts are stated in the second affidavit of Mr. Hechterman sworn on July 18, 1919. He says that one of his company's German relations, Messrs. Lutten and Sohn, of Hamburg, were large importers of oranges, etc., but that owing to the war their business had been entirely brought to a standstill, and that their interest was to prevent their competitors from getting hold of their relations such as agents, growers, etc. On the other hand he states that it was to the advantage of the company to obtain control of a well-founded organization, as this would place them in a position to oppose the ring with greater success, that accordingly an agreement was arrived at between the company and Lutten and Sohn that so long as the latter would be unable to resume business, his company should take over their agents on its own account and employ them for its own business, that in this way his company established relations in Spain and that those persons who had previously been in the employment of Lutten and Sohn became the employees of his company, and have since 1915 been working as agents of his company. Mr. Hechterman further states that under this agreement, Manuel Mas became the agent of his company, and that telegrams and letters exhibited to his former affidavit sworn herein on December 4, 1918, relate to his employment, and that it was the business of Mas to find persons willing to consign their goods to his company. No doubt the exact nature of the arrangement may not be capable of accurate ascertainment, and, owing to the capture, there is no evidence how the arrangement would have been carried through had the oranges arrived at the port of Rotterdam in the ordinary course of business.

It is sufficient to say that their Lordships can find no evidence to support affirmatively the contention that Lutten and Sohn would have had the control of the destination of the oranges after their arrival at Rotterdam or that it would have been within their competency to order that the oranges should be sent from Rotterdam to Hamburg.

The question still remains whether having regard to all the facts the appellants have discharged the onus which the Order in Council places upon them of establishing that, at the time when the oranges were intercepted, and seized, their destination was not an enemy base of supply. The contention of the appellants is that the destination of the voyage was Rotterdam, and that if the voyage had been carried through without interruption the oranges would in the ordinary course of business have been offered to local dealers at public auction, thereby becoming part of the common stock of a neutral country, to whatever consumers they might ultimately be sold. It was said that if this contention is not accepted, and it is held that the anticipation that a large proportion of the oranges may go for consumption in Germany is sufficient to make them contraband, the consequence is that goods within the category of conditional contraband would be liable to seizure and condemnation wherever there was anticipation that they might be largely sold to enemy customers. The answer is that the anticipation of a large sale to enemy customers is not sufficient to make goods liable as articles of contraband, but that there must be anticipation of sale either to an enemy Government, or an enemy base of supply. For instance, in the present case, there must be anticipation that a large number of oranges sold would find their way to Hamburg, which has already been held in many cases to be an enemy base of supply. Whether the appellants have negatived the suggestion that the destination of the voyage was Hamburg must be determined on the documents and oral evidence produced at the trial. Their Lordships are unable to hold that the mere fact that goods will be offered for sale by auction at the port of arrival is in itself conclusive of the innocency of their destination.

J. C. 1921 THE NORNE.

It would appear to them to be too wide a generalisation that whatever the special conditions may be, the goods could never be condemned as contraband if once it is established that they would be offered at public auction in a neutral market. It is no doubt necessary to draw a distinction between a case of contraband which depends on destination to an enemy Government, or enemy base of supply, and a case under the Reprisals Order in which a destination to an enemy country is sufficient. It appears from the judgment of the learned President that an argument was brought forward in the Prize Court that if the contention that the oranges were contraband could not be established, nevertheless it could be established that they were destined for an enemy country, and were therefore goods which should be stopped under the Reprisals Order, to be dealt with at the expiration of the war. The learned President expressed the opinion that if the case of the respondent failed in Prize, he could not succeed under the Reprisals Order, and no alternative claim under that Order was brought before their Lordships on the appeal. It appears, however, to be evident in the present case that if the destination of the voyage was Germany, the place of destination was Hamburg, and oranges destined for Hamburg would undoubtedly be liable to condemnation as contraband.

The learned President, after examining the documentary evidence with great care, and after hearing the important oral evidence of Mr. Hechterman, found that Lutten and Sohn at Hamburg had a substantial interest in the business of importing oranges from Valentia, carried on through the syndicate under this interest, and that this interest went beyond their interest as agents in respect of which they were paid a commission of 10 cents per case of oranges forwarded. He further found that the interest of Lutten and Sohn was not to sell oranges in Holland, but to make the trade a part of the Hamburg trade, which they had carried on before the outbreak of the war. The learned President further found, on evidence which was sufficient to warrant such a finding, that a scheme was arrived at between Hechterman and

Lutten, prospectively in September and definitely early in November, of which Mr. Hechterman gave him an inadequate and uncandid account. He thought it clear that the object of this scheme was to give Lutten an interest and a share in the business, such as would result from a common desire that the oranges should proceed to and reach Hamburg. It was for Mr. Hechterman to displace the possibility of any such destination being reconciled with the contemplated auction in Rotterdam, not for the Court to speculate by what means (of which there are obviously several) an auction might be made to play a part in the transmission of the cargo to a predetermined destination in Hamburg. The President held that Mr. Hechterman, whom he had seen and heard, had failed to discharge the burden of proof in this matter.

Their Lordships having examined the documentary and oral evidence, with the assistance of counsel, are not prepared to differ from the learned President on these questions of fact, or to differ from him in the conclusion that the appellants have not discharged the onus placed upon them of proving that the oranges were not destined for an enemy base of supply. Moreover, the learned President has found that the appellant syndicate withheld from the Prize Court the fact of the existence of a substantial foreign interest which it was their duty to disclose, and for the non-disclosure of which they must accept all consequent liability. On the whole, their Lordships are of opinion that the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Thomas Cooper & Co.*
Solicitor for respondent : *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1921
March 21.

THE VESTA AND OTHER SHIPS.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Enemy Cargo—Sale in transitu—Delivery under Contract of Sale—Reservation of Right to reject—Title of Neutral Purchaser.

A German steamship bound to Rotterdam with a non-contraband cargo belonging to a company of enemy character took refuge at the outbreak of war in the then neutral port of Lisbon. The cargo was landed on the quay, and on Portugal entering into the war the ship was requisitioned by the Portuguese Government. Subsequently the cargo was sold to a neutral company who shipped it in neutral ships for Amsterdam, sending their managing director to Lisbon for the purpose. A clause in the contract of sale gave the purchasers a right to reject the goods if they found them unsuited to their manufacturing business. The goods were captured on the voyage to Amsterdam :—

Held, that the clause in the contract did not render the sale ineffective as a transfer of the goods to the purchasers, and that as they had taken actual delivery at Lisbon they were entitled to the release of the goods; the delivery of possession under the contract, but not the requisitioning of the German ship, terminated the original transitus and the belligerent right of capture.

Judgment of the Prize Court reversed.

APPEAL from a judgment of the Admiralty Division (in Prize) delivered on May 1 ;, 1920. (1)

The appellants, a Dutch company, appealed from a judgment of the President (Sir Henry Duke) condemning as enemy property about 1000 tons of magnesite ore (non-contraband) seized in the *Vesta* and other neutral steamships.

The facts appear from the judgment of their Lordships.

1921. Jan. 31. *Inskip K.C.* and *Balloch* for the appellants. Conceding that the original shippers were of enemy character, the appellants nevertheless obtained a good title as against the captors, and are entitled to the

* *Present :* LORD SUMNER, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 385.

release of the goods. The original transitus in the course of which the goods were liable to capture was terminated on the Portuguese Government requisitioning the ship. If the original transitus was not then terminated, it was so by the sale and the delivery of the goods thereunder. The clause in the contract which was held by the President to prevent the sale operating as a complete transfer had not that effect. It imposed no condition subsequent so as to prevent the property passing to the appellants, but merely gave them a right to call upon the vendors to take back the goods. The appellants by their agents obtained actual and complete possession of the goods at Lisbon.

[Reference was made to *The Ariel* (1); *The Danckebaar Africaan* (2); *The Baltica* (3); *The Jeanne* (4); *The Bawean* (5); and the Sale of Goods Act, 1893, s. 18.]

Sir Ernest Pollock S.-G. and *Clement Davies* for the Procurator-General. The belligerent's right of capture was not terminated by what took place. The requisitioning of the ship had not the effect of ending the original transitus, since a mere transhipment would not have done so. Nor did the sale have that effect. In order to defeat the right of capture there must be not only a change of the property in the goods, but also a delivery of possession: *The Baltica* (6); *The Danckebaar Africaan* (2); *The Carl Walter* (7); *The Bawean.* (5) There was in this case no delivery of possession. Delivery on board the neutral ships was not an actual delivery to the appellants. Secondly, the belligerent's rights are not affected unless there is a complete transfer, leaving no interest in the enemy sellers: *The Sechs Geschwistern.* (8) The clause giving the appellants a right to reject the goods left an interest in the vendors. There is not a complete divesting of the vendor's interest if it can revest under the same contract.

Inskip K.C. replied.

(1) (1857) 11 Moo. P. C. 119.
(2) (1798) 1 C. Rob. 107.
(3) (1857) 11 Moo. P. C. 141.
(4) [1917] P. 8.
(5) [1918] P. 58.
(6) 11 Moo. P. C. 141, 146.
(7) (1802) 4 C. Rob. 207.
(8) (1801) 4 C. Rob. 100.

J. C. 1921 THE VESTA, ETC.

March 16. The judgment of their Lordships was delivered by

LORD SUMNER. About the middle of July, 1914, the steamship *Naxos*, a German vessel belonging to the Deutsche Levante Linie, sailed from Lefkandi and Limni, ports in Eubœa, with a cargo of about 1000 tons of raw magnesite, shipped by the Internationale Magnesiet Werken of Rotterdam and made deliverable to order at Rotterdam. These shippers own magnesite mines in Greece, and the finding of the President, that they were of enemy character though formally a Dutch incorporation, is not now contested. The *Naxos* was still on passage when war broke out, and to avoid the risk of capture took refuge in Lisbon and there remained. An enemy ship cannot thus defeat belligerent rights exercisable so long as the original transitus is deemed to continue. Even transhipment would not have this effect. It is not a question of abandoning the adventure for insurance or other contractual purposes. What is done by an enemy in consequence only of the peril of capture, which is imposed by the opposite Power, is not for prize purposes a voluntary abandonment at all.

Early in 1916 the appellants, the Naamlooze Vennootschap Chemische Fabriek Kampen, a Dutch company who manufacture magnesia out of magnesite at their works at Kampen, in Holland, were in great need of the raw material necessary for their business. On the other hand, the owners of the cargo on the *Naxos* were very willing to sell it, as it was lying useless on their hands at Lisbon, without waiting indefinitely for peace to terminate the risk of capture. The parties came together, and by an agreement dated February 4, 1916, the appellants bought the cargo, and arranged for its transhipment and carriage to Amsterdam by neutral vessels, the *Vesta*, *Castor*, and *Titan*. These ships were detained en route and the magnesite was captured by British captors. The case for condemnation was that the original transit of the magnesite was still in course of execution at the time of seizure ; that it was not in the power of the enemy vendors or of the enemy shipowners to abandon the voyage by the *Naxos* to Rotterdam, so as to create a new voyage in neutral

ships to the detriment of belligerent rights; and that, even if the agreement of purchase was a genuine and not a merely colourable transaction, no title was acquired by the appellants which could be asserted in a Court of Prize so as to defeat a British capture of enemy goods.

The case of enemy ships laden with enemy cargo taking shelter from the risk of capture in neutral ports frequently occurred in the early stages of the recent war, as in older wars, and the question has then arisen how far and under what circumstances the belligerents' rights can be defeated, if the first physical step of successfully eluding capture is followed up by mercantile transactions intended to transfer the ownership of the goods to neutrals. Sir William Scott, in *The Vrow Margaretha* (1), thus states the general rule, applicable alike to ships captured at sea and to goods captured at sea after transfer from ships which have taken refuge in a neutral port: "In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He goes on to give as a reason for the rule what is rather a maxim of prudence than a consideration of law—namely, the risk of protection being given to the enemy goods by transfers to neutrals, the true character of which it might be impracticable to expose. (See, too, *The Jan Frederick.* (2)) *The Vrow Margaretha* (1), however, was a case where the transfer to the neutral took place both in good faith and before actual or anticipated outbreak of war.

In *The Baltica* (3) the question came before the Judicial Committee in the form of a transfer made in contemplation of outbreak of war, and the Committee applied the rule as stated in *The Vrow Margaretha* (1), and also by Story J. (Pratt's Story, p. 64), "the same distinction is applied to purchases made by neutrals of property in transitu; if purchased during a state of war existing or imminent and impending

(1) (1799) 1 C. Rob. 336, 338. (2) (1804) 5 C. Rob. 127, 131.
(3) 11 Moo. P. C. 141.

J. C. 1921 THE VESTA, ETC.

danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery." Accordingly the property having been not merely bought by but delivered to the neutral buyer before seizure in good faith and without any reservation to the seller, the transaction was held to be protected. The actual words of Mr. Pemberton Leigh should be quoted: "At this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the transitus, in the sense in which for this purpose the word is used, had ceased." (1)

In the recent war, the same principle has been recognized in cases where the alleged transfer has taken place not merely while war is imminent, but after it has actually broken out; but until the present case it has not been necessary to decide on the validity of the transaction, because either the purported sale has not been bona fide or the cargo was contraband with an ulterior enemy destination: *The Rijn* (2); *The Jeanne* (3); *The Bawean* (4); or the matter has rested in contract only without actual delivery to the buyer before the time of the seizure: *The United States.* (5) It was, however, observed in *The Bawean* (4) by Sir Samuel Evans P., that actual possession by the neutral buyer is essential. Mere removal of goods from the enemy vessel, which is in shelter, to a neutral vessel which can carry them on, will not serve, even though constructively the possession of the captain of the neutral vessel is that of a bailee for a buyer who will be liable for the freight. Upon this point it is not necessary for their Lordships to pronounce any opinion. They, however, do not agree that as long as the original voyage of the enemy vessel, on which the goods were loaded, is incomplete, there always remains an indefeasible right to capture. Though in *The Baltica* (6) the ship had actually completed her voyage to Copenhagen when the new owner

(1) 11 Moo. P. C. 141, 150.
(2) [1917] P. 145; [1919] A. C. 546.
(3) [1917] P. 8.
(4) [1918] P. 58.
(5) [1917] P. 30.
(6) 11 Moo. P. C. 141.

took possession of her, the passage above quoted from the judgment shows that the taking possession was itself a determination of the transit, and the observations of Sir W. Scott in *The Danckebaar Africaan* (1) and *The Carl Walter* (2) bear this out.

It is worth while to consider the object and operation of the agreement of purchase in this case before passing to its terms. No doubt the enemy vendors wished to avert the loss which capture of their cargo would involve; and, if they could do this by means which did not merely shift the loss to the shoulders of the neutral buyers, they would in effect by saving themselves defeat the belligerent enemy right of capture. Such a result would cause them no regrets, but there is no reason to suppose that their object was not principally the mercantile one of turning their goods into cash, or that, if the price was satisfactory as it apparently was, they had any concern in recovering the goods for any purpose or in any event.

The appellants, on the other hand, knew the position of the cargo. They equally obviously had no mind to see the ore captured and condemned; and if the transaction in the result extricated the cargo from the possible risk of capture and placed it in ultimate safety, incidentally they intended to defeat the rights of belligerents. Though on both sides the primary object was purely commercial, the operation in fact involved the secondary result of finally avoiding capture.

There was a further consequence involved. The ore was bound for Holland, where it would be adjacent to Germany. In Lisbon it was isolated and remote. If by any means, legitimate or illegitimate but successful, it could be conveyed to Holland and there in one way or other again fell into the hands of its original shippers, they would have successfully performed their original importation, the risks of war notwithstanding, and could, if so minded, send the ore on into Germany. How far ultimate transport to Germany was ever in the sellers' minds does not appear and need not further be considered. As regards the buyers it must be

(1) 1 C. Rob. 107. (2) 4 C. Rob. 207.

J. C. 1921 THE VESTA, ETC.

remembered that the Internationale Magnesiet Company was on its face a Dutch company and that, even if the appellants had been shown to be aware of the ownership of the shares and the control of the business which invested it with enemy character in time of war, they might still, on the state of the decisions at the time in question, have supposed that its Dutch incorporation availed to make it for all purposes a neutral persona.

The materiality of these considerations is that they show the importance in this and in all similar cases of a close and vigilant scrutiny of the whole transaction, for the purpose of seeing whether it truly is what it purports to be—an out and out and genuine sale without reservation of any interest in or to the seller in the goods—or whether it merely cloaks under the form of a sale an operation for transporting the seller's goods to the destination from which risk of capture at sea excludes him.

In the present case it has been found by the President, and is not now contested, that the appellants acted in complete good faith; that they were in great need of raw material; that they intended to consume it in their own works in Holland; and that, except in so far as the true construction of the agreement of sale may involve another conclusion, they were buying out and out for themselves, and were not designedly reserving to the sellers any interest in the goods for their benefit. Accordingly the matter now turns on the construction and effect of the agreement, for, if that be plain, the mere fact that under other circumstances it might have been put to illicit uses cannot affect its meaning.

It was an agreement "regarding the sale and purchase of 1000 tons of raw magnesite lying in the steamship *Naxos*," and it declared that "the magnesite is purchased lying in the steamship *Naxos*, and all the expenses arising through the release, delivery, transloading and transport of the goods . . . . shall be borne by the buyer." The price was 25 florins per kilo, payable in two instalments, half payable as soon as the seller should produce evidence that the goods

would be released by the Portuguese Customs and no objections were raised by the shipowners, the other half payable as soon as the goods have arrived. The agreement proceeded: "and, in case of superficial approval by the buyer or in case the ship or cargo is lost or is declared forfeited by one of the belligerent parties, immediately after this has become known, but not later than two months after the payment of the first instalment, irrespective of whether all the goods have been shipped or not. The transloading, shipment, etc., shall take place in the sellers' name for the account and risk of the buyer. If the goods when being manufactured are found to be unsuitable for buyers' industry, the buyers shall have the right to refuse to accept the parcel, and the sellers shall be bound to take back the magnesite and to repay the amount of the purchase price already paid, increased with the sea freight from Lisbon, to a maximum of thirty shillings per ton."

The agreement was made without first inspecting the magnesite, or drawing and testing samples, or forwarding a trial shipment for experiment in the works of the Chemische Fabriek at Kampen. It contemplated that the whole 1000 tons would be sent forward to Holland and yet that, when they reached Holland, they might not suit the buyers' purposes. The reason probably is that the appellants had been buyers of Eubœan magnesite before the war and were generally well acquainted with its character. At any rate this circumstance, which might have excited a good deal of suspicion but for the admission of the appellants' good faith, is not now of any real significance.

The result is that the appellants agreed to buy specific and ascertained goods, as they lay in the *Naxos*, undertaking all risk and expense thereafter arising, except general average and demurrage in connection with the vessel, and were bound to pay half of the price in advance of shipment and in certain events the other half also. Without saying anything as to the prudence of it, of which the parties were the best judges, the agreement so far seems clearly to intend that the sellers are to part with all interest in the ore as soon as it leaves

J. C. 1921 THE VESTA, ETC.

the *Naxos*, and to receive their price for the goods, lost or not lost, with considerable promptitude. There is no provision even for adjusting the price in case the quantity falls short of 1000 tons, beyond anything that can be inferred from the fact that, while each moiety is named as one-half of 25,000 florins, the price itself is described as 25 florins per 1000 kilos.

The Procurator-General contends, and the learned President held, that the effect of the clause, beginning "if the goods when being manufactured," is to reserve an interest in the enemy vendor, which prevented an effective transfer of them at Lisbon; that, in the language of Sir William Scott in *The Sechs Geschwistern* (1), there was not "a sale divesting the enemy of all further interest," for "anything tending to continue his interest vitiates a contract of this description altogether." The President's view was that the sale was only to be complete on the fulfilment of a condition subsequent—namely, that the goods should be found suitable for the buyers' industry—in other words, that it was a sale on approbation, a delivery of the goods of the enemy company to the neutral company on sale or return. The expression is relied on that "the buyer shall have the right to refuse to accept the parcel," as showing that the time for his acceptance and consequent acquisition of the property does not arrive until he has at least had a reasonable opportunity of testing the magnesite in his works at Kampen.

Their Lordships are unable to adopt this view. If the words "refuse to accept" stood alone, or if the scheme of the agreement was that the sellers should deliver at Kampen and there tender the ore to the buyers, much might be said for holding that the property had not previously passed. Prefaced, however, as they are by a whole series of expressions pointing to an earlier passing of property, and combined with provisions which disinterest the seller in the shipment and transport and the risks of the voyage, the words are susceptible of another interpretation. They form part of

(1) 4 C. Rob. 100.

a clause, the remainder of which provides that the sellers shall be bound to "take back" the magnesite. Physically a person takes back something that he has brought to a place, but the sellers were not to bring this cargo to Kampen. The buyers were to do that. In connection with passing property a person "takes back" what had previously been but has ceased to be his; by a repurchase he undoes part at least of the prior transaction. That the taking back is here a new transaction and not merely the failure of the old one is further indicated by the fact that the next provision is not simply one for undoing the payment for the goods, as it would undo the physical tender of them. The seller is not to repay all the buyer's outlay—the expenses at Lisbon, the expenses of discharge and the freight incurred, whatever it might be—but only the purchase price and "the sea freight from Lisbon to a maximum of thirty shillings per ton"; that is to say, he is to pay a different and a smaller total consideration than had been paid by the buyer, and he gets the goods safely arrived in Holland in addition. It is further to be observed that what is expressed is the buyer's right and the seller's obligation if that right should be exercised. The words do not invest the seller with a corresponding right to have the goods back, if they are found unsuitable for the buyer's industry. Even if the sellers had such a right as that, in the event of the goods being found unsuitable, they could require a resale to themselves whether the buyers desired it or not, this would be a personal right, the breach of which would sound in damages only. There was not reserved to them any proprietary interest in the goods themselves. What is provided for is a liability on, not a right in, the seller, and none the less for the fact that, if that liability were enforced, he might find it mitigated by substantial advantages to himself. The buyers were at all times in a position to give a good title to third parties without the concurrence of the sellers. It is not as though the buyer's title was to be automatically divested in the happening of an event. It is divested only at his option, an option which indeed only becomes exercisable in a

J. C. 1921 THE VESTA, ETC.

certain event but remains his option still. Nor is a possibility that the seller may become owner again, if called upon to take the goods back, equivalent to the reservation of an interest under the original sale. No authority was forthcoming for the contention that it suffices for the preservation of a belligerent right of capture, if mere provision is made for the contingency of a new interest arising in the original enemy seller upon the happening of a condition subsequent, and their Lordships are not minded thus to extend a rule, which in itself may in some cases press hardly upon neutral trade. Their Lordships are accordingly of opinion that the agreement, truly construed, provides for a sale out and out to the buyers and a consequent passing of the property to them on delivery to them at Lisbon, with a supplementary option to the buyers in a certain event to require the sellers to buy back the goods at a price agreed.

It was laid down by their Lordships' Board in *The Ariel* (1) and in *The Baltica* (2), after full discussion, and more recently in the consolidated appeals of the *Kronprinsessan Margareta*, *The Parana* and *The Rena* (unreported at present (3)), that a neutral can acquire the property in merchandise from an enemy owner, while the merchandise is afloat, if there is an out and out transfer, neither accompanied by elements of unreality nor by any reservation of property therein to the seller, provided that the buyer takes actual delivery and not a mere symbolical delivery by handing over mercantile documents.

The question therefore arises whether the appellants got actual delivery of the magnesite at Lisbon, and this comes to be the crucial question in the appeal as being the real test whether the transitus of the ore was truly determined. After the agreement for the sale of the magnesite had been entered into war broke out between Portugal and the German Empire, and the Portuguese Government took possession of the German ships lying in the Tagus, including the *Naxos*, and hoisted on them the Portuguese flag. It is suggested

(1) 11 Moo. P. C. 119. (2) 11 Moo. P. C. 141.
(3) Since reported, p. 486 above.

that this in itself terminated the original transitus of the *Naxos*, as no doubt in a physical sense it did, and thereby put an end to the rights of His Majesty, such as they might be, to seize the cargo of the *Naxos* if afterwards found at sea, no matter what the circumstances or nature of its transfer to new owners. It is a singular result of the entry into the war of a friendly Power in aid of His Majesty and his allies, and there is no reason why the exercise by the Portuguese Government of their right to requisition the ship should prejudice their allies as to the cargo. No authority for the proposition was forthcoming.

For some time no progress was made with the discharge of the magnesite, but eventually in September the appellants sent to Lisbon, as a special representative, their managing director, M. Barendrecht, and he obtained from the Portuguese Government permission for the discharge of the magnesite from the *Naxos*. This was done, and for a time the ore was stored on the quay, the costs of stevedoring and storage being paid by the appellants and the instructions for the work being given by M. Barendrecht, who was present, according to his affidavit, on their behalf. From the quay the ore was subsequently loaded on the three vessels, belonging to the Koninklyke Nederlandsche Stoomboot Maatshappij, which were detained by the British naval forces. The Internationale Magnesiet Werken indorsed the *Naxos* bills of lading to the appellants, M. Barendrecht handed them to the Netherlands consulate at Lisbon, and new bills of lading were given for the carriage by the ships in question to Amsterdam. It is true that these bills of lading described the Netherlands consul as shipper and as consignees the Netherlands Overseas Trust, but the former was acting on behalf of the appellants, to whom he was giving official assistance, and the consignment to the latter was in accordance with the general regulations of the Trust and for the purpose of effecting delivery to the appellants for consumption in Holland. Indeed, in the bills of lading there are express provisions that the ships' agents are to notify the appellants, and one at any rate of them is indorsed

J. C. 1921 THE VESTA, ETC.

to the appellants by the Netherlands Overseas Trust. Their Lordships think it clear that, on delivery of the ore overside ex the *Naxos*, the Internationale Magnesiet Werken washed their hands of it, and that, in accordance with the contract, the appellant company directed and were liable for whatever was done with it till it was reloaded on the forwarding steamers. It follows that the appellants took actual delivery at Lisbon. It is not a question of constructive possession by delivery to a carrier, who recognizes by the form of his bill of lading his obligation to deliver to the consignee; it is as complete delivery as is possible to a company, which can only act by human agents.

Had the claimants failed to establish their title, an argument was to have been submitted to their Lordships, which was admitted before the President, that if the ore had not become neutral property it remained enemy property and was being carried under a neutral flag to a neutral country without ulterior destination of any kind. Accordingly the Declaration of Paris was to have been invoked. It appears to have been overlooked that the claimants could only use this argument after their own title to independent rights had been negatived. They never purported to have merely bought the enemy owners' right or chance of escape. They could not claim on behalf of the enemy owners, if the enemy owners could not claim for themselves, and if the enemy owners were competent to claim for themselves, they should have entered an appearance and have done so. Enemy claimants have been repeatedly recognized, to assert rights under international conventions, e.g., *The Möwe* (1); *The Marie Glaeser* (2); or to contest condemnation of their goods, if shipped or carried under circumstances which give immunity from capture: *The Roumanian* (3); *The Hakan.* (4) Their Lordships have already decided that ownership claims on appeal must be made by appellants who come before the Board as owners. It follows that, if this point had arisen for decision, the claimants would

(1) [1915] P. 1.
(2) [1914] P. 218.
(3) [1916] 1 A. C. 124.
(4) [1918] A. C. 148, 150.

have failed upon the preliminary ground that it was not available to them.

In the result their Lordships will humbly advise His Majesty that this appeal should be allowed with costs, and that the decree appealed against should be reversed and the goods or their proceeds should be released to the appellants.

J. C. 1921 THE VESTA, ETC.

Solicitor for appellants : *A. M. Oppenheimer.*
Solicitor for respondent : *Treasury Solicitor.*

[PRIVY COUNCIL.]

THE FALK AND OTHER SHIPS.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

J. C.* 1921 *March* 16.

Prize Court—Damages—Contraband Goods—Evidence of reasonable Suspicion —Delay in Release of Goods—Restriction on Export—Interest on Proceeds.

The Procurator-General in establishing that there was a reasonable suspicion that contraband goods had an enemy destination, so as to justify their seizure, is not limited to information found in the ship's papers or known to the captors at the time of seizure. Nor is he liable for delay in releasing the goods if the delay has not been due to neglect or to some indirect object, and he has materials which are proper to be examined judicially.

A decree for the release of goods does not warrant actual ability to remove them from the realm ; the Procurator-General is not liable for a loss in the selling value of goods owing to a Government restriction upon their export.

It is not a general rule that whenever the Crown has had the benefit of the proceeds of goods seized, the claimant is entitled to interest if the goods are released to him.

Observations in *The Dirigo* [1919] P. 204, 207, on the point last mentioned, approved.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) dated May 11, 1920. (1)

* *Present :* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) Unreported.

J. C. 1921 THE FALK, ETC.

By the judgment appealed from the President rejected a claim by the appellants, a Swedish company, to recover against the Procurator-General damages and costs in respect of the seizure and detention of certain tanning materials—namely, 364 tons of quebracho extract and 800 tons of chestnut extract—shipped from the United States in the *Falk* and seven other neutral steamships and consigned to Swedish ports.

The facts appear from the judgment of their Lordships.

With regard to the claim to damages for the detention (as distinct from the seizure) of the goods, the appellants by their pleading contended that after a reasonable period had elapsed from the time when they deposited with the Procurator-General for investigation the documents relating to the goods and affidavits verifying their claim it became his duty to consent to the release of the goods, and that not having done so he was liable to them in damages for the loss thereby caused. They further alleged that the detention after that period was not in good faith or in the belief that the goods would be condemned, but in order to compel the appellants to acquiesce in a sale of them in England. The Procurator-General denied those allegations.

The learned President in a considered judgment found on the facts that there was reasonable ground for belief that the goods might on inquiry prove to have had a German destination and that it was not established that the seizure was unjustifiable. With regard to the detention he said: "The case of detention until the end of 1916 depends in substance upon the same considerations as relate to the original seizure, and indeed the claim for unreasonable detention as presented to me was based chiefly on the refusal of the Procurator-General to release the goods after the full disclosure of the claimants' case which was made in December, 1916. I have not been able to find a point of time as to which I could properly say that as from that period the continued detention was wrongful. I am satisfied it was not wilfully or recklessly wrong in the sense in which at common law recklessness is evidence of malice. On the contrary, I think the Procurator-

General regarded the case as one which could fairly be presented to the Court. I was pressed to apply a process such as that which was applied in *The Kronprins Gustaf Adolf* (1), and to fix a time at which, after the causes for condemnation had been instituted, the Procurator-General ought to have withdrawn the claims of the Crown. The judgment in *The Kronprins Gustaf Adolf* (1) does not seem to me, however, to lay down any principle capable of general application, and, in the absence of any proof of bad faith, I know of no ground on which a litigant can be held liable in damages, because of his continued prosecution of a claim which he has rightfully made. Moreover, as to delay in going to trial the claimants were at all time, themselves entitled to apply for a prompt hearing of the cause." The learned President accordingly dismissed the appellants' claim.

1921. Jan. 27, 28. *MacKinnon K.C.* and *Spence* for the appellants.

Sir Gordon Hewart A.-G. and *T. Mathew* for the Procurator-General.

[In the course of the argument reference was made to *The Ostsee* (2); *The Eliza* (3); *The Baron Stjernblad.* (4)]

1921. March 16. The judgment of their Lordships was delivered by

LORD SUMNER. In November, 1915, the claimants, old-established dealers in hides and tanning materials in Sweden, bought for the purposes of their trade 500 tons of quebracho extract and 1000 tons of chestnut extract from James Meyer, of Copenhagen, which Meyer in his turn bought from Schmoll Fils et Compagnie, of Paris, Basle and New York.

The goods began to come forward almost at once, and eight vessels with parcels of them on board were brought into British ports between the end of that month and the early part of the following May. In due course writs were issued against them as having an ulterior enemy destination in

(1) (1917) 2 Br. & Col. P. C. 418.
(2) (1855) 9 Moo. P. C. 150.
(3) (1854) 1 Spinks, 8.
(4) [1918] A. C. 173.

J. C. 1921 THE FALK, ETC.

Hamburg. They had been conditional contraband since March 11, 1915, and became absolute contraband before the seizure. In the cases of the first five vessels to be detained and of the last but one, the shippers named in the bills of lading were Schmoll Fils et Compagnie, and in the other two the National Export and Import Co., both of New York. In the cases of the first and second the consignee named in the bills of lading was Otto Zell, a forwarding agent at Gothenburg. The claimants themselves were named as consignees in the other cases and they duly appeared and claimed the goods in all.

An assiduous and intelligent agent was then employed by the claimants, who made it his business to procure all documents relating to the matter and to put them at the disposal of the Procurator-General in numerous bundles and portfolios, and the Procurator-General devoted the Christmas holidays of 1916 to their perusal. Assuming them to have been the same as those again submitted shortly before the trial, they filled thirty-four volumes; even those printed in the record, though but a small part of the whole, occupy 450 printed pages.

Accordingly the Procurator-General decided to try to settle the case. At this time neither quebracho extract nor chestnut extract could be exported from the United Kingdom except by special licence, by virtue of a proclamation dated February 3, 1915, and of an Order in Council dated March 18, 1915, issued under the Customs and Inland Revenue Acts of 1879, the Customs (Exportation Prohibition) Act of 1914 and other statutes. He informed the claimants' solicitors of these facts, of which they presumably were and certainly might have been already aware, and offered that the War Office should purchase the goods at the duly authorized price and that the proceedings for condemnation should be discontinued. The claimants insisted on their right to damages and stipulated that both the sale and the discontinuance should be without prejudice to their claims. This was agreed to in letters dated April 26 and October 1, 1917, and the Procurator-General discontinued his proceedings

by leave on July 28, 1919. Thereafter the suit continued for the claimants' benefit only; they were the actors and the parties to take the conduct of it and to press it on. When their claims came to trial they failed. The President decided that, as regards both the original seizure and the subsequent proceedings, what had been done was done on reasonable grounds and was therefore excusable. Hence this appeal.

There can be no doubt that the appellants have suffered a loss, which is regrettable and large. Some four years elapsed between the seizure and the judgment. Their costs have been heavy and they allege that they have had to pay interest to Meyer, their vendor. Above all, the difference between the price which they obtained in England, and that obtainable if they had sold the goods in Sweden, as they meant to do, was on so large a quantity very great.

Their Lordships, however, do not wish it to be supposed that in their apprehension of the matter these large sums could in any case have been chargeable against the Procurator-General. Strictly speaking, only liability is in issue now. If that could be established, it would be for the Registrar and merchants to assess the damages payable for proceedings taken without sufficient grounds, which deprived the claimants of the possession and control of their goods. So much, however, has been said of the commissions and omissions of the Procurator-General, as the occasion, if not the cause, of this great loss, that their Lordships think it would be misleading to pass over in silence the contention which has been raised.

No doubt the effect of sending the vessels in for further inquiry was to bring this cargo within the ambit of the prohibition of export of tanning materials, but it does not follow that all the claimants' loss thereby can be thrown on the captors. The same misfortune would have fallen on them if the vessels had come into a British port of refuge and had there discharged the goods. Further, under a proper licence export would have been permitted, but the claimants never applied for that licence or ascertained whether it could have

J. C. 1921 THE FALK, ETC.

been obtained or not. So far they are presumably the authors of their own injury. Besides, the measure of damage applicable to conversion or detinue of their goods or to failure to deliver them under a contract of sale in an action brought in a municipal Court may be no guide in a claim against captors, without proof of special circumstances. As for loss of interest the claimants' relations with Meyer are remote matters and it was in any case for them to take steps to minimise this and other losses. They seem to have done nothing.

The authorities may be referred to briefly. The foundation of the right, variously expressed in different cases, may be said to be the existence of reasonable suspicion, it may be of illegitimate traffic, it may be of enemy character, it may be of illegal action or service or what not, but there must be such suspicion as warrants inquiry into the facts and adjudication upon them by a properly constituted Court: see the judgment of Story J., in *The George* (1), quoted with approval in *The Ostsee.* (2) Even slight grounds of suspicion may suffice. In *The Elizabeth* (3) the reason given by the Lords of Appeal for condemning the captors in costs was that there appeared to be scarcely any ground for detaining the vessel. The Judicial Committee's judgment in *The Baron Stjernblad* (4) develops the matter. In a case where it has become apparent by statistical evidence or otherwise that a considerable proportion of the collective imports into a neighbouring neutral country of a particular commodity, which is in its nature contraband, does in fact proceed by a continuous transit into the enemy territory, any particular importer of such goods belongs to a class of importers some of whom at any rate must be obviously engaged in contraband trade. Suspicion then attaches to all and the question is one of the existence of reasonable suspicion, not of the possession of proof attaching that suspicion to a particular member of the class. The suspicion for example attaches to the particular goods by reason of the circumstance connected with the

(1) (1815) 1 Mason, 24.
(2) 9 Moo. P. C. 150.
(3) (1809) 1 Acton, 10.
(4) [1918] A. C. 173.

class of goods generally that it is in its nature contraband. Those who seize on the grounds of reasonable suspicion are entitled to the benefit of such evidence as other officers of the Crown may possess as to ulterior destination, and are not limited by the information, or the lack of it, to be found in the ship's papers themselves. Neither at the actual time of seizure nor in the conduct of the proceedings is the officer responsible called upon to constitute himself judge or justified in doing so. The decision, if grounds for seizure existed, must in general rest with the Court, and the Court is also peculiarly the tribunal to determine any questions of suggested delay in the proceedings. The judgment in *The Ostsee* (1) is the standard authority on all these matters. It points out that the ship (and equally the cargo) "may be involved with little or no fault on her part in such suspicions as to make it the right or even the duty of a belligerent to seize her"; nor is it possible to lay down by any exact definition what the circumstances are that will justify capture or excuse it if no condemnation follows. Even if the circumstances known by the captor at the time of the first detention are not so founded in fact as to serve as an excuse, he may still avail himself for this purpose of other grounds subsequently brought to his knowledge, as he could have done if he had proceeded and obtained condemnation. "It is not necessary," says Sir W. Scott in *The Juffrow Maria Schroeder* (2), "that the captor should have assigned any reason at the time of capture; he takes it at his own peril and on his own responsibility," and from this it must follow that after-acquired knowledge is available for the one purpose or for the other. It is a fallacy to suppose that suspicion can only be reasonable in so far as there are facts before the mind of the person who suspects, and that accordingly no facts learnt subsequently are available to excuse a seizure. The present is not a case of arbitrary or capricious arrest, ventured on the hazard that a case for conviction may ultimately turn up. Nor can it be said of it that there were no "circumstances connected with the ship or cargo affording reasonable ground for belief that one or

(1) 9 Moo. P. C. 150. (2) (1800) 3 C. Rob. 147, 152, 153.

J. C. 1921 THE FALK, ETC.

both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize." (1)

The liability of the Procurator-General, if any, has been rightly presented under two heads: the first, liability for the original seizure; the second, liability in respect of the course taken in the legal proceedings. Somewhat different considerations no doubt arise in the two cases. The original seizure takes place before the particular circumstances have been inquired into; the suit is prosecuted after materials have been collected and time has been allowed for their examination. The element of mere suspicion, so prominent when first the prize is brought in, diminishes as investigation proceeds and proof takes its place. The prospect of the discovery of substantial evidence is one that can be weighed by those in charge of the case for the Crown. It follows in their Lordships' opinion that a point must ultimately be reached, at which, without purporting to act as a judge, the Procurator-General should decide for himself whether to go on or not. This obligation is all the more important, because of the change of practice, necessitated by changed circumstances, which authorizes the collection of material at large and its presentation by both sides instead of deciding the question of release or detention, in the first instance, only on evidence coming from the ship.

It was not contended at the bar that the liability under the first head was to be considered simply as at the time when the vessels were first diverted, or simply upon the information then present to the minds of the actual officers who ordered the diversion. Counsel recognized that, under the conditions imposed by modern warfare during the late war, the question should be considered in the light of the information available to the Procurator-General and his assistants at the time when the effective decision was taken to detain the goods for the purpose of condemnation in prize, that is, substantially, at the dates of the writs. At the trial evidence was given, in the usual form of information obtained and communications intercepted, with regard to the parties

(1) 9 Moo. P. C. 150, 162.

connected or apparently connected with these shipments. It is true that it was given in affidavits recently sworn, which did not in all cases specify the dates at which particular events relied upon had first become known to the authorities concerned. The President, however, gave attention to these points, for he discarded some matters on the ground that they were after-acquired information and assumed that others only were available at the critical time, and, as the claimants do not appear to have pressed that the Procurator-General should be more specific in the matter of dates, the objection has little weight now.

It appears, then, that when the several proceedings were begun the following matters were available for consideration. The goods were contraband goods of a kind often and largely sent on a continuous transit from the United States through Sweden to Germany, where they were scarce and dear. They were going to Gothenburg, a place of import for goods intended for Swedish consumption, but convenient also and often used for this ulterior trade. The National Export and Import Company of New York had been concerned in it, and so had Otto Zell, who furthermore was a forwarding agent for others, and in fact had no interest in the claimants' goods, and an intercepted message had given ground for expecting large quantities of quebracho extract to be sent shortly from Schmoll Fils et Compagnie to Scandinavian ports for account of James Meyer, though it was not yet known, or is not shown to have been known at the time in question, that Meyer was the claimants vendor in respect of these very consignments.

Under these circumstances their Lordships are of opinion that they cannot question the President's conclusion as to the existence of sufficient grounds for the detention. Although in the long run condemnation could not be hoped for, still, when the goods were placed in prize there was probable cause for a judicial inquiry with a view to their condemnation. It is not a case like *The Ostsee* (1), where the detention, though honestly made, was made on a ground which in fact had no existence. Nor is it such a case as is there mentioned as

(1) 9 Moo. P. C. 150.

J. C. 1921 THE FALK, ETC.

possible of a seizure "where not only the ship is in no fault, but she is not by any act of her own open to any fair ground of suspicion." (1) In such cases (and the proposition applies equally to goods) the belligerent may seize at his peril and take the chance of something appearing on investigation to justify the capture, but failure is visited with the liability to pay damages and costs. Nor was the case merely one of goods going to a geographical neighbour of Germany or of goods going to a port whence they could easily be sent on. Of all the goods, in their nature contraband, which went to that port, some, perhaps many, parcels certainly had Germany as their ultimate destination, and large profits awaited any neutral consignees who sent them there. As for the goods themselves, some came from and some went to persons known to be engaged in the trade. Their Lordships cannot doubt that, as regards all their consignments, the claimants were rightly brought into Court to explain where they were really going to.

As the second part of their case the appellants claim damages for the action or the inaction of the Procurator-General after they had disclosed their documents to him and had satisfied his requisitions. They say that it then became his duty to obtain the prompt and effective release of the cargo, and, if necessary, to apply for and to procure a licence to export it. They even aver, as a ground for claiming all damages consequent upon the detention of the goods, that if the prohibition so stood in the way of the fullest benefit being derived from a decree of release, the Prize Court was bound to restore the position in their favour by requiring the Procurator-General to pay compensation, because another, and the appropriate, department had failed to exercise its discretion in the manner desired.

Their Lordships think that in principle these contentions fail. The greater the mass of transactions to be inquired into, the more astute the schemes of contraband traders, the more enlarged the available sources of information and the means of making it subserve the discovery of truth, the more

(1) 9 Moo. P. C. 157.

is it necessary that the Procurator-General should have all proper opportunity of preparing the case for submission to the Court, free from the insistent pressure of a liability in damages and costs, so long as he has not been guilty of delay for indirect objects or from mere neglect, and has materials which are proper to be examined judicially. It is not suggested against the Procurator-General that he protracted the proceedings in bad faith or maliciously, or in fact at all. His good faith is indeed conspicuous throughout. When he offered a settlement, the claimants, under advice, entertained it without protest and shortly accepted it. They reserved their existing claims, but they made no allegation of any fresh ground of complaint. The Procurator-General is not a judge; neither to the Crown, to the Court nor to the claimants does he owe any duty to decide questions which are for the Court, nor is he entitled to proceed only when he has a personal conviction upon the question in suit. His duty is to act reasonably. Even where the paucity of the evidence for condemnation or the abundance of the evidence in reply would lead the Procurator-General, as a reasonable man, to abandon any further attempt to obtain a condemnation, there is no authority for saying that the ship or cargo will be detained thereafter at his expense in damages, and that the application for release is merely a protective step for him to take in self-defence. It is equally a step which the claimant can take and ought to take to mitigate his damages. As to this the Procurator-General duly applied for a discontinuance of his part of the proceedings. Before he did so the claimants had made no application to the Court, so far as the record shows, to accelerate their course, and after that discontinuance they were themselves domini litis. He was under no obligation towards them to apply for an export licence and, if none was forthcoming, he came under no liability in consequence. Instead of applying for a licence themselves, as they were free to do, the appellants preferred to sell the goods to the War Office and to take their chance of obtaining damages on some ground at the trial.

A passage in the judgment of Sir Samuel Evans in *The*

J. C. 1921 THE FALK, ETC.

Kronprins Gustaf Adolf (1) is relied on as laying down a rule that the Procurator-General must within a reasonable time after getting full information into his hands decide whether he has a case for condemnation or not, so that if he has none he may apply for the release of the rest, and that, if he fails to do so, he proceeds or delays to discontinue at his personal risk as to damages. The point does not seem to have been argued; the proposition intended to be laid down is by no means clearly expressed, and it has been doubted whether anything more was intended than to give interest in the particular case to mitigate exceptional hardship: *The Dirigo*. (2) Their Lordships agree with the view expressed by Lord Sterndale in that case that, if the decision in question purported to lay down a general rule that "wherever the Crown had the benefit of the money they ought to pay interest to the claimant when an order of release was made," the decision so far cannot be supported.

It may be that there are cases so plain that to keep them up is patently unreasonable and some mulct, probably in costs, should be the consequence of undue tenacity. Deliberate procrastination or a scheme for delay would of course be a wholly different matter. Where however there is a real question of law, a conflict of testimony or a genuine doubt as to the inference to be drawn from ascertained facts, the Procurator-General is not to be visited with costs or damages merely on the ground that he submits it to the judgment of the Court, instead of taking the decision into his own hands. He is entitled to have genuine doubts cleared up by the claimant to the satisfaction of the Court. The duty of a neutral claimant to explain what is doubtful or obscure in his conduct or position for the enlightenment and decision of the Court has been laid down in *The Louisiana* (3): "In the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there

(1) 2 Br. & Col. P. C. 418. (2) [1919] P. 204, 227.
(3) [1918] A. C. 461, 464.

was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists. The State of his captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points."

It would be inconsistent to hold that the Procurator-General is bound to forestall that decision, or permitted to seek it in a genuinely doubtful case only at his own personal risk.

The settlement into which the appellants entered, even though made without prejudice and accompanied by a reservation of their rights as to damages, took place before, or at any rate no later than, the earliest date at which it can be said that the Procurator-General ought to have concluded that he had no case to go upon, and it is from this settlement and sale that nearly all the damages incurred by the appellants have arisen. Further, it put them in no better position than they would have been in if they had received the goods themselves under a decree for their release instead of receiving the proceeds of their sale to the War Office. A decree for release does not warrant actual ability to remove the goods from the realm. This might be impossible for want of bunker coals or of labour or of repairs, and yet it could not be said that the redress given by the Prize Court was made inefficacious by reason of something of which that Court ought to take notice. As is assumed in *The Düsseldorf* (1), release means release out of the custody of the Marshal in this country, where the goods are, and it is for the owner of them to arrange to remove or dispose of them as he can. The Court of Prize cannot give itself a more extensive jurisdiction in cases where the neutral is unable to remove his property out of the realm, or award damages against the Procurator-General for consequences arising from matters to which he is a stranger, merely because he and the officers of the Customs are alike in the service of the Crown. As a matter of fact in this case the prohibition on export was duly made under statutory authority, and the question of granting a licence

(1) [1920] A. C. 1034.

J. C. 1921 THE FALK, ETC.

to export was not raised, but had it been otherwise the claimants should have sought their remedy, if any, against the officials actually concerned, in the ordinary Courts of the country. An imaginary case was put of sovereign power being used to thwart neutral claimants, to stultify the Prize Court and to defeat the benefit of adjudication in prize, by an executive prohibition of the export of any and every subject matter released. Their Lordships cannot entertain so far-fetched a case. Should it ever arise the Courts of the country concerned will be most fitted to pass upon it. The jurisdiction of the Court of Prize is to condemn or to release, not to override the executive after release has taken place. It is bound by the statutes of this country, in which it sits, and cannot interfere with acts done under Proclamations or Orders in Council validly issued by virtue of those statutes. If this is so, it cannot do indirectly what it has no power to do directly, and give damages against the Crown in prize because it had no power to give to the successful claimants permission to export.

Their Lordships are accordingly of opinion that neither in respect of the original detention of their goods nor of his subsequent conduct in the proceedings in prize can the Procurator-General be made liable in damages or costs, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Bull & Bull.*
Solicitor for respondent : *Treasury Solicitor.*

Observations of LORD SUMNER, at p. 812, *applied.* BORTHWICK-NORTON *v.* ROMNEY WARWICK ESTATES, LTD. [1950] 1 All E.R. 362.

[PRIVY COUNCIL.]

THE ZAMORA No. 2.

J. C.*
1921
March 16.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Neutral Ship—Contraband Cargo—Knowledge of Shipowners—Condemnation of Ship.

Neutral steamship carrying a complete cargo of contraband goods condemned, the large lump-sum freight paid in advance for the charter of the ship, combined with the shipowners' conduct in refraining to make inquiries with regard to the venture, and other circumstances, establishing as a fact that they knew of its contraband character.

The Hakan [1918] A. C. 148, and the evidence by which knowledge on the part of a shipowner can be established, discussed.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) dated March 31, 1919. (1)

The appellants, a Swedish company, appealed from a judgment of the President (Lord Sterndale) condemning their steamship the *Zamora*, captured on April 19, 1915, while carrying a complete cargo of contraband having an enemy destination.

1921. Feb. 3. *MacKinnon K.C.* and *Balloch* for the appellants.

Sir Ernest Pollock S.-G., *Stephens K.C.* and *Lilley* for the respondent, the Procurator-General.

March 16. The judgment of their Lordships was delivered by

LORD SUMNER. This was a case of condemnation of a ship and its entire cargo. The latter was contraband and had an ulterior enemy destination; and of this it was held that the shipowner had sufficient knowledge. The ship was Swedish: the voyage New York to Stockholm, and the cargo consisted of 400 tons of copper, 101,494 bushels of wheat and 69,379 bushels of oats. It was purchased on f.o.b. New York terms

* *Present:* LORD SUMNER, LORD WRENBURY and SIR ARTHUR CHANNELL.

(1) Unreported.

J. C. 1921 THE ZAMORA No. 2.

from sellers unconnected with the contraband adventure. The date of the capture was April 19, 1915.

At the outset the grounds of suspicion against the cargo were not great. The contraband trade had not then attained the magnitude which characterised it later on in the war. Copper and cereals were no doubt in demand in Germany, but they were also required for common consumption in Sweden and that in large quantities. The proximity of Sweden to Germany was therefore of less importance; unless the case against the cargo succeeded, there was none against the ship.

Claimants duly appeared, and a large body of documents relating to the cargo was soon forthcoming. The purchases, the shipment, the taking up of documents and the destination of the cargo were fully set out and minutely vouched. Though the copper and the cereals were alleged to belong to different consignees, unconnected with one another, they were all insured by the same policies, a singular circumstance in itself, and the further fact that they were insured f.p.a. raised further suspicion. There for a considerable time the matter rested. It remained a case of the importation of commodities in common use in a neutral ship from one neutral country to another by neutral merchants for consumption in their own country.

Appearances, however, were deceptive. The consignees of the copper were a Swedish company, which might well have been above suspicion, for, as Lord Sterndale records, there were upon its Board of Directors the Minister for Foreign Affairs in the late Swedish Government, an ex-Minister of Finance and an ex-Minister and late member of the Supreme Court, yet behind the screen of these highly respectable personages there was being carried on a speculative adventure, which involved a continuous scheme of deception, to be supported, in case of need, by much hard swearing. The whole cargo, in fact, belonged to the Austrian Government, and was imported into Sweden en route for Austria. The ship was chartered to a German, who was acting as agent for the Austrian Government, and the Swedish consignees were merely playing a part in the transaction. The documents

were genuine enough : that is to say they came into existence at the time and for the purposes for which they were ostensibly created, but behind them all and behind the charterer and the consignees, who were puppets, handsomely paid, stood an enemy Government. No more striking instance has occurred of a contraband transaction which all but succeeded ; none which proves more conclusively what patience and tenacity are needed in probing to the bottom an apparently straightforward case, or how liberal and even indulgent a Court of Prize must sometimes be in granting the time required to exhaust all the means at the captors' disposal for discovering the truth.

How that truth became known to the Procurator-General, it is not now material to inquire. It was disclosed by him on affidavit in August, 1918, and proved to be conclusive. The claimants of the copper withdrew their claim without a contest. The claimants of the cereals made shift to fight their case and lost. The President condemned both the copper, the wheat and the oats. There remained the case of the *Zamora*. After hearing the evidence of Mr. Banck, the managing director of the company, which owned her, the President condemned the ship. It is from this condemnation that her owners now appeal.

The case made was that even where the whole cargo consists of contraband, nothing less than actual knowledge of its character by the carrier will forfeit the ship. It was not denied that circumstances may raise a presumption of knowledge such that the carrier must rebut it or fail. It was not contended that a person, who had knowledge of facts sufficient to point the mind of a reasonable man to the truth, could escape by wilfully shutting his eyes to fuller information, but the presumption of knowledge was said to be one only of fact and not of law, each case therefore depending on its own circumstances, so that, if cargo is bound to a neutral port and consists of unwarlike commodities in substantial demand and common use there, only proof and not presumption of knowledge of its ulterior destination will condemn the ship. If the President held that a decree condemning the entire cargo would in itself warrant a decree condemning the ship also, he

J. C. 1921 THE ZAMORA No. 2.

was wrong in spite of the judgment of Sir Samuel Evans in *The Hakan* and *The Maracaibo*. (1) The true proposition was one quoted from the judgment of this Board in *The Hakan* (2) : " there can be no confiscation of the ship without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo."

It may be admitted that knowledge of the character of the cargo is more obviously natural when the ship is being loaded for her owners' account than when she is only chartered, and when she is chartered at a rate of freight on the quantity delivered with a cesser of liability in favour of the charterer, than when she is chartered for a lump sum freight payable in advance. Conversely a voyage to an enemy port is more significant than one to a neutral country, even though it is a neighbour of enemy territory, and the loading of a cargo of arms and ammunition than the loading of commodities no less indispensable to neutrals than to belligerents. So far the circumstances of each case may vary and modify the conclusion almost indefinitely, but one circumstance is common to all the cases and can never be forgotten, that is the existence of a state of war with the temptations and the profits which contraband traffic holds out to complaisant traders. It does not follow that every case stands by itself and is independent of authority, nor need captors make out the knowledge of the shipowner as prosecutors have to bring home a charge to a person accused in an English criminal Court. In any case there is no immunity to a shipowner because he charters his vessel and does not concern himself with the cargo. Indeed, in one respect at least this case requires a sharper degree of scrutiny, for such a course is so easily made a screen for the schemes of others, and so easily becomes deliberate blindness.

It is clearly settled that a shipowner who carries an entire cargo of contraband knowingly forfeits his ship in prize. What constitutes knowledge and what suffices as evidence of it may be matters of difficulty. During part of the eighteenth century the rigorous doctrine still prevailed that any carriage

(1) [1916] P. 266. (2) [1918] A. C. 148, 155.

of contraband involved as a penalty the confiscation of the carrying ship. By the end of that time, Sir William Scott records, in *The Ringende Jacob* (1) and in *The Neutralitet* (2), that the practice of the great powers had greatly relaxed that rule. In *The Hakan* and *The Maracaibo* (3) Sir Samuel Evans did not inquire whether the carrier knew the contraband character of the cargo. He took it that the ancient rule was suspended only and was still in existence and capable of being revived, so that, except in so far as the Crown had waived its rights by adopting art. 40 of the Declaration of London, the old rule must still be enforced. The objection to this is that Sir William Scott records a change founded on the agreement of nations, one of the most important sources of international law. After over a century of recognition, can it be said that the relaxation is a mere revocable waiver, which a single sovereign can withdraw ? Lord Parker of Waddington, in pronouncing their Lordships' judgment on appeal in *The Hakan* (4), pointed out that the common element, which unites the varying practices of different nations, is knowledge on the carriers' part of the character of the cargo carried, and that a presumption of knowledge, sometimes rebuttable and sometimes not, is the feature which makes relevant the proportion of the contraband cargo to the whole. Some countries attach to certain proportions a presumption of knowledge in all cases, irrespective of the extent to which the mind of the particular carrier or shipowner may consciously have been privy to the carriage of contraband. The English Prize Courts, at any rate, have long held that if a shipowner knowingly carries a cargo which is, in whole or in large part, contraband, he is liable to forfeit his ship. It accordingly becomes necessary to examine the facts of this case somewhat at length, for if they warrant the inference that the shipowners knew that they were carrying contraband, the decree of condemnation should be affirmed without further inquiry.

The Rederiaktiebolaget Banco, of Stockholm, owned two steamers, the *Zamora* and the *Augusta*. Most of the shares

(1) (1798) 1 C. Rob. 89.
(2) (1801) 3 C. Rob. 295.
(3) [1916] P. 266.
(4) [1918] A. C. 148, 155.

J. C. 1921 — THE ZAMORA No. 2.

were held by the family of Banck, and Mr. Bror Banck, its head, was the largest shareholder and managing director of the company. He was also managing owner of another ship, the *Orion*, managing director of the Orient Company, which also owned a vessel, and had a good deal of house property. He must, therefore, be credited with much business experience, and his affidavits and oral evidence testify to his good education and his extensive knowledge of English.

To Mr. Bror Banck there came one day early in 1915 a Mr. G. Pott, who introduced himself as a shareholder in the Orient Company, seeking a disengaged ship, as he wished to charter one for grain and general merchandise from New York to Stockholm. He came twice. Mr. Banck looked him up in the directory, and found that he had a good address and a large income, and spoke about him to a friend or two, "who had only good to say of him." Accordingly he obtained the *Zamora*. Pott was in fact a German, who previously had had something to do with goloshes. He had now gone into shipping. There was no correspondence. The charterparty, though made out on a form which was ill adapted to a lump sum freight, provided for a hiring for the voyage for "14,500*l*., all in British sterling, payable before signing bills of lading at current rate of exchange for bankers' sight bills on London bank." It is dated February 20, 1915.

The ship was then two days out from the Tyne bound for New York. On reaching that port his agents told the captain that they had a cable from Mr. Banck giving the names of the shippers and receivers for the grain, and later on another cable gave the same information for the copper, and added "instruct Ohlson proceed direct home north of Shetland." Mr. Banck must have surmised that Pott had sublet the entire steamer to other parties, who were to provide the cargo, and, when Pott afterwards told him so, he seems to have expressed no surprise. He says that he thus prescribed the route for fear of mines and to the suggestion, that the real reason was to escape search by British ships, he replied "not particularly." From whom he learnt the names of the shippers and receivers of the cargo he does not say. Thus, when his own company's interest

would have suggested inquiry as to the character of those concerned in an adventure which might involve an ulterior enemy destination, he knew little of his charterer, and of the shippers and consignees he knew and asked nothing at all.

The bills of lading for the grain were dated March 18 and made it deliverable to B. Ursells Eftertraedare, paying freight as per charterparty. There is no charter to which this term could apply. The bill of lading for the copper was dated March 20, and provided for payment of freight in cash immediately on discharge in the usual money of the country, but it named no rate. Pott should have paid Mr. Banck 14,500*l.* at least by March 20, when the *Zamora* sailed. Mr. Banck produced his company's books to show that in point of fact 7500*l.*, or its equivalent in kroner, was paid to the company on March 17, for which he said a receipt was given, though no counterfoil was produced nor does the name of the payer appear. The balance only appears in the day book as paid on April 30. Mr. Banck said that it was Pott who paid both sums.

According to Mr. Banck, 14,500*l.* for a voyage of some six weeks or so was just a normal freight at the time, a few pence over the last fixture he had seen, but he produces no charters or evidence to corroborate his statement. It is true that the Crown gave no information upon the point either, but, on a question of freights in Sweden, there can be no doubt which side was best able to develop the evidence. Now the *Zamora* had been bought by the Rederiaktiebolaget Banco in 1912 for only 11,250*l.*, being then thirty years old and in need of repairs, but what they cost is not stated. For insurance purposes she was estimated as being worth 20,000*l.* in 1915, though the sum insured was only 16,000*l.*, and, in consideration of a bail of 14,000*l.*—which the President's judgment states to have been the result of a valuation made for the purpose after the seizure—was released to her owners. When the company was incorporated in 1905 its joint capital was fixed at 335,000 kroner as a minimum, and 1,000,000 as a maximum. In 1918 the shares issued, assuming that they were all fully paid, accounted only for 415,000 kroner. Accordingly, the

J. C. 1921 THE ZAMORA No. 2.

freight for a voyage of two months at most exceeded the purchase price of the steamer three years before and exceeded the amount of her valuation for bail. It fell little short of the amount for which she was insured, and it was very much more than half of the paid-up capital of the company. In favour of Mr. Bror Banck their Lordships will suppose that during the war neutral shipowners regularly made handsome profits, but these figures appear to them to be more than normal. They were, at any rate, big enough to make it worth Mr. Banck's while to put himself about unless he was assured that his freight was in no peril.

He had another reason for concern. His hull insurance against war risks was void if the ship carried contraband of war to a belligerent power, and, of course, as his lump sum freight was to be prepaid, he had no policy on freight at all. Now, of Pott he knew little, and of the consignees less, if he knew anything at all. The welcome awaiting American copper and cereals in Germany if forwarded from Sweden, would obviously be so warm, that the unknown consignees might quite probably be importing them for the purpose of sending them on, but if they left New York by the *Zamora* with an ulterior destination, his war-risk policy on the ship would be void. Nevertheless he remained unconcerned as to the cargo and its consignees, and, even when nearly half his freight remained unpaid until after the ship was in the captors' hands at Barrow, he took it almost as a matter of course. He asked Mr. Pott the reason for the capture, but he was not anxious. "I felt myself as strong as anything," he says, "and I knew there was nothing incorrect." How he knew this he does not say, but he leaves it to be inferred that this was the result of the confidence with which Mr. Pott or perhaps the directorate of the Swedish Trading Company had inspired him. Of the balance of his freight he said nothing: his trust in Mr. Pott's ability to pay was complete. He had heard nothing up to that time of any connection between Pott and contraband German trade. He did not associate high freights, if this was a high freight, with contraband. As he says, "this was only just in the beginning of the war and we never thought anything

of it." He had no reason to doubt that both the copper and the grain were destined for Swedish use, and, further, the export of both commodities from Sweden was prohibited by the Swedish Government. It has been suggested on his behalf that he was just an old ship's captain, a very simple person.

Mr. Bror Banck's confidence in his new acquaintance, Pott, went considerably further. When the second instalment of the *Zamora's* freight was already some four or five days overdue, he actually chartered to him a second ship, the *Augusta*, and again for a lump sum on the same form of charter. This time, however, the freight was paid all at once on April 30, but the charter was somewhat departed from, since instead of drafts in New York, cash was forthcoming in Stockholm.

If these deviations from the strict language of the charters stood alone, they might be explicable on the ground that printed forms of charters were used, more suitable to freights payable on the quantity delivered at rates agreed than to a lump sum payable in advance. There is, however, a further deviation, which is quite inexplicable. This was put to Mr. Banck, who professed to be taken by surprise and said it was a puzzle, a term which the President somewhat ironically adopted. Argumentative explanations were offered, of which it is enough to say that they do not fit the facts. The one person who ought to have explained the matter was not called. This person was Mr. Carl Banck, who was associated in the management of the appellant company's business with his father, Mr. Bror Banck, and had control of it during the latter's not infrequent visits during March and April, 1915, to his house property at Trelleborg and Helsingborg. This gentleman either was unaware of the existence of the lump sum charters for the *Zamora* and the *Augusta* or he treated them as shams. In each case he gave the consignees of the cereals receipts for freight due on those parcels on shipment, in the former case at the rate of 72 kroner per ton of 20 cwt., in the latter at the rate of 60 kroner only. The first was dated March 17, that is before the date of the bill of lading, the second April 7, three weeks before the lump sum freight was paid, if paid it

J. C. 1921 THE ZAMORA No. 2.

was. The sum mentioned in the *Zamora* receipt cannot be made to correspond with the sums entered in the day book as received for chartered freight, and the amount of money exceeds by more than 100,000 kroner the sum which it was Mr. Bror Banck's case that he received from Pott on that very day. Who paid these bill of lading freights, and how the weights of the cargo came to be known in Stockholm at or before the dates of shipment in New York does not appear. Mr. Sten Stendahl, who carries on business as B. Ursells Eftertraedare, the consignees of the cereals, swore that these receipts represented the conditions of his freight engagements with Pott and were given when the money was paid to the appellants for account of Pott, but Mr. Bror Banck evidently professed to be quite unaware that his company had been receiving Pott's freight at all.

The appellants are, therefore, in a dilemma. If what Stendahl says is true, the appellants, by one of their managers, were assisting in the creation of that screen of mercantile documents with which the cargo claimants disguised the truth of the transaction, and in default of explanation must be taken to have done so deliberately, for they were taking charge of Pott's profits, though Pott was in default in paying what he owed them. The accounts which such a transaction must certainly have involved have not been disclosed, doubtless for good reasons.

If, on the other hand, what Stendahl says is false, as in other matters it mainly is, then the lump-sum charter is a sham and the appellants were receiving on their own account a higher freight than they profess to have contracted for, differently calculated and concealed by false book entries. It is not necessary to consider whether old Mr. Banck was in some respects hoodwinked by young Mr. Banck, for the appellants must be affected by the knowledge and conduct of both their managers, but Mr. Bror Banck's attitude in the witness-box was that of a man who was not so much astonished as surprised. The production of these receipts was something that he had not reckoned on, and an explanation was beyond his power to improvise.

In his judgment Lord Sterndale uses the expression, "if Mr. Banck had not actual knowledge, he could have had it, if he had taken the steps which he should have taken to acquire it." This proposition does not really lend itself to any misapprehension, but it may be as well to say something as to the nature of the duty to which it refers. Mr. Banck's position involved two kinds of obligation: the one towards his company, the appellants, and, in respect of his own large holding in it, to himself, and the other towards the Prize Court. His duty to his own company required that he should, among other things, make proper inquiries to safeguard its interests and to avoid exposing its property to risks, which he did not mean to take, in the transaction to which he was committing it. If he neglected this duty, he was disregarding alike his interest as a capitalist and his obligation as a director, and he is open to the inference of fact that after all he knew what he was about and with a full apprehension of the risks run had made up his mind that the freight made it worth while to run them. To the Court his duty is, as representing the claimants, to present their claim frankly and to make such full inquiries as would enable him to put the Court in full possession of the truth as to the claim, so far as it lay in his power to do so. If this duty was neglected, his company is again exposed to the inference that it was not neglected for nothing; that he had at least got upon the track of matters which he thought it better not to pursue, or that the claimants were in possession of information which it did not suit them to divulge. The judgment of Lord Sterndale was not intended to convey and does not convey that Mr. Banck owed a duty to the belligerents to avoid carrying this cargo, but it was carried at his company's risk and to his company's profit, and in exercising their right to prevent contraband traffic belligerents are entitled to the full protection of Courts of Prize in penetrating the disguise of a feigned or deliberate ignorance on the part of neutral claimants.

Lord Sterndale thus expressed his final conclusion: "I think the true inference is that, if Mr. Banck did not know this was a transaction in contraband, it was because he did not

J. C. 1921 — THE ZAMORA No. 2.

want to know, and that he has not rebutted the presumption arising from the fact of the whole cargo being contraband."

Their Lordships have been invited to read this as saying that Mr. Banck is not proved to have known the contraband character of the adventure; that if he did not know, because he did not want to know, he was within his rights and owed no duty to the belligerents to inform himself; and that the *Zamora* is condemned contrary to the passage above cited from *The Hakan* (1) upon a legal presumption arising solely and arbitrarily from the fact that the whole cargo was contraband. It may be that in his anxiety not to state more than he found against Mr. Banck, the learned President appeared to state something less, but there are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when acquired, may be uninteresting or distasteful. To refuse to know any more about the subject or anything at all is then a wilful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon his mind with a conviction that full details or precise proofs may be dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that where ignorance is safe, 'tis folly to be wise, but there he is wrong, for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation and disguise. It is in the latter sense that their Lordships take the President's words. So far from finding that Mr. Banck was devoid of knowledge of the contraband character of the adventure, he thought, and they agree, that Mr. Banck understood it very well, so well that he knew where to draw the judicious line between scanty but sufficient information and undeniable complicity. Knowledge being proved, no opinion need be expressed as to the effect of presumptions in the present case. The evidence fully bears out the conclusion that the transaction was in its inception ambiguous; that any doubts about it were resolved in favour of an

(1) [1918] A. C. 148, 155.

illegitimate complexion, so far as Mr. Banck was concerned, by his incuriosity, his reticence and his detachment. So far from showing that he was truly ignorant, he has only involved his company, the claimants, in the consequences which follow from the hazardous possession of sufficient knowledge to condemn them.

J. C. 1921 THE ZAMORA No. 2.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Thain, Davidson & Co.*
Solicitor for respondent : *Treasury Solicitor.*

[PRIVY COUNCIL.]

REVEREND JOHN WAKEFORD . . . PETITIONER ;
AND
THE BISHOP OF LINCOLN . . . . . RESPONDENT.

J. C.* 1921 *Feb.* 28 ; *April* 19.

Clergy Discipline Act, 1892—*Practice—Leave to appeal—Appeal on Facts—Grounds for giving Leave—Retrial before Judicial Committee—Proof necessary to justify Conviction.*

By the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 4, sub-s. 2 : " If a defendant desires to appeal against any judgment of a Consistory Court under this Act in respect of the facts, he may petition for leave to appeal, and if he satisfies the appellate Court that there is a prima facie case leave shall be given, and he may appeal." By s. 4, sub-s. 4, the appeal is, at option of the appellant, either to the Provincial Court or to the Privy Council.

In the present case leave to appeal was granted to a defendant, a retrial before the Judicial Committee being ordered, upon the ground that an important and damaging piece of documentary evidence was produced only while the defendant's counsel was making his final address to the Court, so that no opportunity was given to the defendant or his advisers to consider the effect of the document or to examine it critically.

Consideration of the authorities, reported and unreported, showing the principles upon which the Judicial Committee will grant a defendant

---

* *Present :* LORD BIRKENHEAD L.C., LORD BUCKMASTER, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE ; with, as assessors, the BISHOPS OF LONDON, ELY, GLOUCESTER, and ROCHESTER.

J. C.
1921
WAKEFORD
v.
BISHOP
OF
LINCOLN.

leave to appeal upon the facts from a decision under the above-mentioned Act.

A clergyman should be convicted by a Consistory Court under s. 2 of the Clergy Discipline Act, 1892, only upon such proof as, if the charge were of an offence against the criminal law, would require a verdict of guilty.

PETITION.

The petitioner, a Canon and Precentor of Lincoln and Archdeacon of Stow in that diocese, was convicted by the Consistory Court of the diocese on February 5, 1921, under s. 2 of the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), upon charges preferred by the respondent Bishop that on March 13 and 14, and on April 2, 1920, the petitioner had committed adultery at an hotel at Peterborough.

On February 19, 1921, the petitioner gave notice of his present petition to the Judicial Committee under s. 4 of the Act above mentioned for leave to appeal to His Majesty in Council. The grounds set out in his petition were: (1.) that one of the clerical assessors had been guilty of misconduct in that he had prejudged the case, (2.) that the conviction was against the weight of the evidence, and (3.) that fresh material evidence had been discovered since the trial. The first ground was supported by affidavits to the effect that on the day before the trial the assessor in question said to two persons that he should not believe a word the petitioner said. The petition was ex parte: see r. 67 of the Clergy Discipline Act Rules, S. R. & O. 1892.

1921. Feb. 28. *Sir E. Marlay Samson K.C.* and *Wilfred Lewis* for the petitioner relied upon grounds (1.) and (2.) stated above, citing on the first ground *Wynn* v. *Bishop of Bangor* (1) and *Rex* v. *Syme.* (2) The third-mentioned ground was abandoned, but it was stated that the document put in by the prosecution towards the end of the trial (and referred to in their Lordships' judgment) had rendered material further evidence which was available at the trial. It was contended that the trial was of an unsatisfactory character and desired that the Judicial Committee should

(1) (1739) 2 Com. 601. (2) (1914) 24 Cox C. C. 502.

themselves rehear the whole matter: see r. 69 of the Rules above-mentioned.

Hansell appeared for the respondent under notice from the Judicial Committee, and upon their Lordships expressing the prima facie view that there were respects in which the matters might have been more fully investigated, did not desire to resist the application.

Their Lordships ordered that the matter should be reheard by the Judicial Committee by way of appeal.

The reasons for giving leave to appeal were subsequently stated in their Lordships' judgment upon the appeal (1), and alone form the subject of this report.

April 28. The judgment of their Lordships was delivered by

LORD BIRKENHEAD L.C. Their Lordships are of opinion that this appeal fails. The contest has turned upon the facts, and the Board would not in an ordinary case have thought it necessary to make any detailed statement of the evidence and of the reasoning which have led them to this conclusion. The case, however, is not ordinary. It has involved a patient inquiry, extending over seven days, during which a mass of testimony has been adduced and sifted by the experienced counsel who have represented the appellant and the respondent respectively. The issues raised are of vital importance to the appellant. They involve his means of livelihood, his reputation, and his position in the calling which he has hitherto followed. Having regard to the office which he has filled in the Church of England they are also of moment to all who are of that communion and to the Church itself. Their Lordships think it desirable, therefore, to discuss at some length those features in the case which in the event have proved decisive.

Before doing this, however, it is necessary to state briefly the circumstances in which the appeal came to be heard before

(1) The appeal was heard on April 7, 8, 11, 12, 14, 15, 18, there appearing *Sir Edward Carson K.C.*, *Sir E. Marlay Samson K.C.* and *Wilfred Lewis*, for the appellant, and *Douglas Hogg K.C.* and *Hansell* for the respondent.

J. C.
1921
WAKEFORD
v.
BISHOP
OF
LINCOLN.

this Board. When their Lordships dealt with the matter previously they advised His Majesty to grant leave to appeal. It was then, for obvious reasons, undesirable that any elaborate statement should be made of the grounds upon which that advice was given. They think it useful now, before discussing the matters principally at issue, to state upon what principles their Lordships decided that leave ought to be granted.

The grounds upon which leave to appeal was sought fell under two heads—namely, those arising from the alleged misconduct of one of the assessors, and those based upon the allegation that the decision of the Consistory Court was against the weight of the evidence adduced before that Court.

To support the first ground, the appellant produced before their Lordships two affidavits to show that one of the assessors had, before the trial in the Consistory Court, used expressions capable of bearing the construction that he had formed a bias against the appellant. Under the Clergy Discipline Act, 1892, s. 2 (*c*), the assessors "shall, for deciding a question of fact, be members of the Court and the decision of such question must either be the unanimous decision of the assessors or that of the Chancellor and at least a majority of the assessors." The assessors, therefore, occupy a position in deciding questions of fact which is not that ordinarily held by assessors, and is more closely analogous to that ordinarily occupied by a full member of the Court, or, in some respects, by a jury. The expressions set out in the affidavit were of such a nature as would, if this ground for appeal had stood alone, have forced their Lordships to consider whether the statements were well founded and, if so, whether they were not so grave as to disqualify the assessor from holding his office and to vitiate the whole proceedings. As they came before their Lordships, the affidavits were uncontradicted, and owing to the procedure which had been necessarily followed, they could not have been at that time contradicted. If, therefore, the Board had proceeded to deal with the matter upon this ground, they would have been forced to direct an adjournment, so as to give an opportunity to those conducting the prosecution, and to the assessor

concerned, to answer the allegations and to address to their Lordships such observations as would assist them to a conclusion. This course would necessarily have entailed heavy costs alike upon the appellant and the respondent, and would have involved a further delay in the final disposal of the case which would have been injurious both to the appellant himself and to the interests of the Church at large. Unfortunate as these consequences might have been, however, their Lordships would have had no choice but to direct such an adjournment, had it not been that it appeared to them that for other reasons leave to appeal must be granted and that therefore a further hearing before the Board must, in any event, ensue. Having regard to these considerations, their Lordships have not thought it necessary to go further into the questions which arise upon the affidavits and express no opinion upon them.

Before the questions of fact are considered which it has been material to review upon the hearing of the petition, it appears desirable that their Lordships should indicate their view as to the principles which guide the Board in considering applications for leave to appeal upon facts.

Appeals from the decision of the Consistory Court under the Clergy Discipline Act have been comparatively rare. Only eight proceedings have come before this Board, two of which were appeals as of right upon a point of law. Of the remaining six :—

Smyth v. *Bishop of St. Albans* is not reported. It appears from the records that the allegation in this case was one of drunkenness. Leave to appeal on the facts was granted, but no record remains of the reasons which actuated their Lordships. The appeal was subsequently allowed on the ground that the evidence was insufficient to support the charge.

The next case, *Evans* v. *Barrett,* is also unreported. Application for leave to appeal on the facts was made on the ground that certain evidence which the appellant had been prepared to produce had been excluded. Leave was refused, and Lord Watson in delivering the judgment of the Board said : " It is sufficient to say that in it " (an affidavit

J. C. 1921 WAKEFORD v. BISHOP OF LINCOLN.

of the appellant) "from beginning to end there is nothing to suggest to their Lordships that the petitioner is or was in possession of any evidence which would tend to shake the conclusions which the Court came to on the graver charges preferred against him, or even to displace their conclusions with respect to the charges of intoxication. Under these circumstances their Lordships will refuse leave to appeal."

Evans v. *Woods* (1) was an application for leave to appeal from a judgment of the Consistory Court of the Diocese of Worcester. Leave was refused, and the Lord Chancellor (Lord Halsbury) delivering the judgment of their Lordships said: "It is impossible to suggest that any prima facie case has been made out. Ample evidence was before the Chancellor of the Consistory Court to justify the decision at which he arrived. It is idle to suggest that there is any ground for appeal on anything that has yet been seen or heard, and, indeed, even upon the present application, it is only suggested that some evidence might, or peradventure might, be forthcoming which might to some extent qualify the evidence given before. No definite proposition has been put before their Lordships, and no definite evidence suggested, in face of the fact that this gentleman himself, being a competent witness, did not tender himself for examination or deny the facts alleged against him. No new fact is now alleged that ought to reopen the inquiry."

The next case is *Moore* v. *Bishop of Oxford.* (2) The proceedings upon the petition for leave to appeal are not reported. Leave to appeal was granted and the proceedings upon the appeal are reported. The Consistory Court convicted the appellant of definite immoral acts and also of an immoral habit in that he had been habitually guilty of swearing and ribaldry, or, as the offence was stated in a further charge, of offences against the laws ecclesiastical, being offences against morality within the meaning of the Clergy Discipline Act, 1892, in that he was habitually guilty of swearing and ribaldry. On the first set of charges, those relating to a definite immoral act, their Lordships were of

(1) [1900] A. C. 338. (2) [1904] A. C. 283.

opinion that the charge broke down upon the ground that the statements of the only witness relied upon for the purpose of bringing the charge were uncorroborated by any conduct, act or proof, and, being discredited by her own version of the transaction, could not be accepted as conclusive against the appellant. On the second set of charges, those relating to swearing, their Lordships found that the appellant had on three or four occasions used language the use of which would be disgraceful to anybody, whether clergyman or layman, but they took the view that the offence contemplated by the statute—namely, of being habitually guilty of swearing and ribaldry, was not made out, and in these circumstances they were of opinion that the appeal should be allowed with respect to both sets of charges.

In *Lee* v. *Atherton* (1) leave to appeal was refused on the ground that the petition for leave was lodged six months after the delivery of the judgment of the Consistory Court—r. 161 requiring a petition for leave to appeal on facts to be lodged in not more than sixteen days—and that no explanation was given of the delay such as would have justified their Lordships in enlarging the time under the powers conferred upon them by r. 90. In *Lovibond* v. *Lee* (which is not reported) leave to appeal on the facts was refused and no reasons were given for their Lordships' decision.

It is not easy to draw from these cases any principle which is of general application or capable of affording much guidance to their Lordships in the consideration of the petition for leave to appeal in the present case. The statute itself leaves the matter at large, requiring their Lordships to grant leave if the appellant "satisfies the appellate Court that there is a prima facie case." It may, however, be inferred from the observations of Lord Watson in *Evans* v. *Barrett* which are set out above, of Lord Halsbury in *Woods* v. *Evans*, and from the proceedings in *Moore* v. *Bishop of Oxford*, that the petitioner must satisfy the Board either that the evidence before the Consistory Court was not such as to justify the conclusion at which that Court arrived, that is, that the

(1) [1904] A. C. 805.

J. C. 1921 WAKEFORD v. BISHOP OF LINCOLN.

decision of that Court was against the weight of evidence, or that since the hearing before the Consistory Court the petitioner has obtained, and is now in a position to tender, definite evidence (the effect of which must be made clear) which, if it had been before the Consistory Court, might or would or ought to have affected the decision. In the last case a satisfactory explanation must be offered to the Board why that evidence was not produced before the Consistory Court.

In the present case, none of these doctrines, if they may so be termed, apply, but leave to appeal was granted upon the facts, not because the decision of the Consistory Court was, in their Lordships' opinion, contrary to the weight of evidence, but because the manner in which that evidence, or some of it, was presented to, and dealt with by, the Court was such as to render the whole trial unsatisfactory. The principal issues of fact before the Consistory Court in the present case were whether on two particular dates the appellant, who admittedly spent the night at the Bull Inn, Peterborough, was alone or in company with a woman unknown. If the appellant was accompanied by a woman on either date he was guilty of an act immoral according to the law ecclesiastical. In the course of the oral testimony given before that Court, it became apparent that there existed, or were alleged to exist, documents in support of the allegation that, on one of those occasions at least, the appellant was not alone and that, included in the bill for hotel accommodation which he discharged, there were items which were attributable to the presence of his alleged companion. Some of these documents were already in Court, but one of the most vital was not. This was a book, arranged somewhat in the nature of a cheque book, so that a slip could be torn from it and fastened as a receipt upon the bill rendered to the traveller. On this slip the total of the bill was entered, a second slip (which formed part of the book and was not detachable) and a carbon paper being inserted behind it, so that words and figures written on the upper slip were impressed through the carbon upon the second piece of paper. When the existence of this book was disclosed in the

Consistory Court, the book was sent for, but it only reached the Court when the case for the respondent had concluded and when Sir Marlay Samson, the appellant's counsel, was in the act of making his final address to the Court in favour of his client. The book so produced disclosed that there were written upon the non-detachable slip words and figures which, when they were compared with the entries in a book called "the tabular book," made it clear that the bill for which the appellant had paid was in respect of two persons and not of one. This book when produced must have made a great impression upon the minds of the members of the Consistory Court, as indeed it did upon the minds of their Lordships when produced before them, and, when joined with the other testimony, written or oral, against the appellant, formed an essential link in the chain of evidence which, in their Lordships' view, makes it impossible to interfere with the decision. This very circumstance rendered the manner in which it came before the Consistory Court below fatal to the proceedings of that Court. No opportunity was, or in the circumstances could be, available to the appellant or to his advisers of considering the effect of a piece of evidence very damaging and, in the issue before the Consistory Court, possibly conclusive. It might have been that upon a more minute examination of the book itself or upon a comparison between it and the other books kept at the Bull Inn, some explanation could have been offered, or some mistake discovered. As events have turned out, there were circumstances in relation to the books which were open to, and in fact have received, much damaging comment, but at the moment the appellant's mouth was to all intents and purposes closed. Sir Marlay Samson could not have been expected to appreciate so swiftly the effect of this piece of evidence upon his client's position that he could then and there, in the closing stages of the proceedings, address his own mind and direct those of the Court to a serious consideration of the documents. It appeared to their Lordships, therefore, that a decision arrived at in such circumstances, and necessarily influenced by a piece of evidence adduced at such a time

J. C. 1921 WAKEFORD v. BISHOP OF LINCOLN.

and in such a manner, was so unsatisfactory that it could not stand, and they accordingly advised that leave to appeal should be given.

Upon the hearing of the appeal before this Board, the proceedings took the form of a retrial. There were called before the Board the witnesses who gave evidence before the Consistory Court and a number of persons who did not, and their Lordships had also before them the documentary evidence produced below. This mass of oral and written testimony has been examined in minute detail. Every particle of the fabric which has been built up to establish the truth of the charges against the appellant has been the subject of debate and explanation. He is not charged with any offence against the ordinary criminal law, but with an "offence against the laws ecclesiastical, being an offence against morality," and upon that charge he has been "prosecuted." He is entitled that such an offence shall be proved against him as clearly as if he were the subject of a prosecution before an ordinary criminal court, and he is to be convicted, if at all, not on grounds of suspicion, however strong, not by reason of the peril to the Church of an acquittal on doubtful evidence, but only upon such proof as, if the charge were of an offence against the criminal law, would require a verdict of guilty.

[Their Lordships' judgment then proceeded to a full and detailed examination of the evidence, and concluded as follows :] The result, therefore, is that their Lordships will humbly advise His Majesty to dismiss the appeal. Costs must follow the event. The appellant's action has involved the Bishop of Lincoln in heavy expenses, and their Lordships see no reason why he should not, so far as may be, be recouped for the expenditure which he has incurred in the execution of a public duty.

Solicitors for appellant: *Peter Thomas & Clark, for Armitage and Speaight.*

Solicitors for respondent: *Lee, Bolton & Lee.*

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1921, will be as follows:—

In the First Series,

[1921] 1 Ch. [1921] 2 Ch.

In the Second Series,

[1921] 1 K. B. [1921] 2 K. B. [1921] 3 K. B. [1921] P.

In the Third Series,

[1921] 1 A. C. [1921] 2 A. C.

INDEX.

ABANDONMENT—Insured adventure.
See INSURANCE (MARINE) 2.

ACCEPTANCE OF RENT—Lease—Breach of covenant—Waiver.
See LANDLORD AND TENANT.

ACCIDENT.
See WORKMEN'S COMPENSATION.

ADMIRALTY JURISDICTION.
See SHIPPING.

AGREEMENT FOR SALE — Emphyteutic lease—Construction.
See CANADA.

APPEAL—Judicial Committee—Practice.
See CLERGY DISCIPLINE ACT, 1892.

ARREST OF SHIP.
See SHIPPING.

ASSISTANCE—Right of compulsory pilot to —Failure of master crew to report.
See SHIPPING.

AUSTRALIA—New South Wales.
See SHIPPING.

BARONETCY—Heir to—Bequest.
See WILL.

BEQUEST—Heir to baronetcy.
See WILL.

BIGAMY.
See DOMICIL.

BILL OF LADING.
See SHIPPING.

BOND AND DISPOSITION IN SECURITY—*Minute of Agreement — Punctual Payment — Reduction of Rate of Interest on punctual Payment—Construction—Estoppel.*
Interlocutor of the First Division of the Court of Session in Scotland affirmed. MACLAINE *v.* GATTY - - **H. L. (Sc.) 376**

BREACH OF COVENANT—Waiver.
See LANDLORD AND TENANT.

BREACH OF MINING REGULATIONS.
See WORKMEN'S COMPENSATION.

BRITISH COLUMBIA.
See CANADA.

BRITISH TRUSTEE—Foreign beneficiary—Income tax—Dividends not remitted to United Kingdom.
See REVENUE.

CANADA.
See LANDLORD AND TENANT.

2. —— (**BRITISH COLUMBIA**)—*Practice —Writ—Service out of the Jurisdiction— "Contract to be performed within the jurisdiction"—Sale of Ships—Reasonable Evidence of a Contract—Refusal to take Delivery—Rules of Supreme Court, Order* XI., *r.* 1 (*e*).
Judgment of the Court of Appeal affirmed. HEMELRYCK *v.* WILLIAM LYALL SHIPBUILDING CO., LD. - - - **J. C. 698**

3. —— (**QUEBEC**) — *City of Quebec — Water Supply—Statutory Powers—Riparian Owner—City of Quebec Incorporation Act* (29 *Vict. c.* 57, *Can.*), *s.* 36, *sub-ss.* 1, 3 *—Civil Code of Quebec, art.* 503.
Judgment of the Court of King's Bench affirmed. CITY OF QUEBEC *v.* BASTIEN **J. C. 265**

4. —— (**QUEBEC**) — *Common — Grant by Seigniors to Inhabitants — French Law — Validity—Construction—Extraneous Evidence —Power of Inhabitants to alienate — Cons. Stats. L. C.*, 1861, *c.* 41.
Judgment of the Court of King's Bench reversed on one point, but otherwise affirmed. PRÉSIDENT ET SYNDICS DE LA COMMUNE DE LAPRAIRIE *v.* COMPAGNIE DE JÉSUS **J. C. 314**

CANADA—*continued.*

5. —— **(QUEBEC)**—*Emphyteutic Lease—Agreement for Sale—Construction—Liability of Vendor under Lease.*
Judgment of the Supreme Court reversed. LAMPSON *v.* CITY OF QUEBEC - **J. C. 294**

6. —— **(QUEBEC)** — *Insurance (Fire)* — *Explosion incidental to Fire—Warranty—Quebec Statutory Conditions — Variation proposed by Insured—Quebec Insurance Act (R. S. Queb.*, 1909), *arts.* 7034–6.
Judgment of the Court of King's Bench affirmed. CURTIS'S AND HARVEY (CANADA), LD. *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO., LD. - - - **J. C. 303**

7. —— **(QUEBEC)**—*Lands appropriated to Indians—Dominion or Provincial Title* — 13 *&* 14 *Vict.* (*Can.*), *c.* 42, *ss.* 1, 2—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 109—*Sale of Crown Property by Sheriff—Title of Purchaser—Code of Civil Procedure, arts.* 399, 2213.
Judgment of the Court of King's Bench reversed. ATT. - GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA - - - - - **J. C. 401**

8. —— **(QUEBEC)**—*Marriage — Impediment to Marriage — Relationship — Roman Catholics—Rule of Roman Catholic Church—Impediment not specified in Civil Code—Civil Code of Quebec, art.* 127.
Judgment of the Superior Court reversed. DESPATIE *v.* TREMBLAY - - **J. C. 702**

9. —— **(QUEBEC)**—*Municipal Taxation —Resolution of Municipal Council—Agreement fixing Annual Tax—Compromise of Claim to Exemption — Validity.*
Judgment of the Court of King's Bench affirmed. CITY OF MONTREAL *v.* COLLÈGE SAINTE MARIE - - - - **J. C. 288**

10. —— *Tidal Water Fisheries—Power of Province to grant exclusive Licences — Right of Public—Regulative Power of Dominion*— 29 *Vict.* (*Can.*) *c.* 11, *ss.* 3, 6 — *British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *head* 12.
Judgment of Court of King's Bench reversed. ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR THE PROVINCE OF QUEBEC - **J. C. 413**

CAPTURE—Enemy ship—Neutral territorial waters.
See PRIZE COURT.

CARGO—Contraband.
See PRIZE COURT.

—— Enemy.
See PRIZE COURT.

—— Release of—Expenses of detention.
See PRIZE COURT.

CARRIAGE—Contraband—Freight.
See PRIZE COURT.

CASES :—

—— *Ariel, The* (1857) 11 Moo. P. C. 119.
Followed. THE EDNA - **J. C. 735**

CASES—*continued.*

—— *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* [1914] A. C. 153.
Applied. ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR THE PROVINCE OF QUEBEC - - - **J. C. 413**

—— *Baltica, The* (1857) 11 Moo. P. C. 141.
Followed. THE EDNA - **J. C. 735**

—— *Beryl, The* (1884) 9 P. D. 137, 144.
Dictum of Bowen L.J. in, discussed. S.S. MENDIP RANGE *v.* RADCLIFFE **H. L. (E.) 556**

—— *Ceto, The* (1889) 14 App. Cas. 670, 693–4.
Dictum of Lord Herschell in, discussed. S.S. MENDIP RANGE *v.* RADCLIFFE - - **H. L. (E.) 556**

—— *Commissaire d'Ecole* v. *Price* (1895) 1 Rev. de Jur. 122.
Approved. ATT.-GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA **J. C. 401**

—— *Conway* v. *Pumpherston Oil Co.* 1911 S. C. 660.
Overruled. A. G. MOORE & CO. *v.* DONNELLY. FIFE COAL CO. *v.* SHARP OR GREENWOOD OR COLVILLE. FIFE COAL CO. *v.* FYFE OR GORDON - - **H. L. (Sc.) 329**

—— *Dirigo, The* [1919] P. 204, 207.
Observations in, approved. THE FALK - - - - **J. C. 787**

—— *Dolphin* v. *Robins* (1859) 7 H. L. C. 390.
Dicta of Lord Cranworth in, considered. LORD ADVOCATE *v.* JAFFREY - - **H. L. (Sc.) 146**

—— *Düsseldorf, The* [1920] A. C. 1034.
Distinguished. THE VALERIA **J. C. 477**

—— *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.
Discussed. ATT.-GEN. *v.* CORY BROS. & CO., LD. KENNARD *v.* CORY BROS. & CO., LD. - **H. L. (E.) 521**

—— *Hakan, The* [1918] A. C. 148.
Discussed. THE ZAMORA NO. 2. **J. C. 801**

—— *Hobbs* v. *Guardian Assurance Co.* (1886) 12 Can. S. C. R. 631.
Approved. CURTIS'S AND HARVEY (CANADA), LD. *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO., LD. - - - - **J. C. 303**

—— *Hooley Hill Co. and Royal Insurance Co., In re* [1920] 1 K. B. 257.
Approved. CURTIS'S AND HARVEY (CANADA), LD. *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO., LD. - - - - **J. C. 303**

—— *Hurdman* v. *North Eastern Ry. Co.* (1878) 3 C. P. D. 168.
Distinguished. GERRARD *v.* CROWE **J. C. 395**

CASES—*continued.*

—— *Johnson* v. *Taylor Bros. & Co.* [1920] A. C. 144.
Distinguished. HEMELRYCK v. WILLIAM LYALL SHIPBUILDING CO. **J. C. 698**

—— *Leeds and Hanley Theatre of Varieties* v. *Broadbent* [1898] 1 Ch. 343.
Approved and followed. MACLAINE *v.* GATTY - - **H. L. (Sc.) 376**

—— *Le Sueur* v. *Le Sueur* (1876) 1 P. D. 139, 142.
Dictum of Sir Robert Phillimore in, disapproved. LORD ADVOCATE *v.* JAFFREY - - **H. L. (Sc.) 146**

—— *Luna, The* (1810) Edw. 190.
Discussed. THE BERNISSE; THE ELVE - - - - **J. C. 458**

—— *Mapp* v. *Straker* (1914) 7 B. W. C. C. 18.
Disapproved by Lord Shaw of Dunfermline. ARCHIBALD RUSSELL, LD. *v.* CORSER - **H. L. (Sc.) 351**

—— *Nova Scotia Steel Co.* v. *Sutherland Steam Shipping Co.* (1899) 5 Com. Cas. 106.
Considered and distinguished. MACLAINE *v.* GATTY - **H. L. (Sc.) 376**

—— *Ostsee, The* (1855) 9 Moo. P. C. 150.
Followed. THE BERNISSE; THE ELVE - - - - **J. C. 458**

—— *P. Caland, The* [1893] A. C. 207, 212.
Dictum of Lord Herschell in, approved. S.S. MENDIP RANGE *v.* RADCLIFFE - - **H. L. (E.) 556**

—— *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634.
Distinguished. ATT.-GEN. *v.* CORY BROS. & CO., LD. KENNARD *v.* CORY BROS. & CO., LD. - **H. L. (E.) 521**

—— *Rover* v. *South African Breweries* [1918] 2 Ch. 233.
Overruled. SCOTTISH UNION AND NATIONAL INSURANCE CO. *v.* NEW ZEALAND AND AUSTRALIAN LAND CO., LD. - - **H. L. (Sc.) 172**

—— *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888) 14 App. Cas. 46.
Followed and applied. ATT.-GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA - - - **J. C. 401**

—— *Scott-Chisholme* v. *Brown* (1893) 20 R. 575, 580.
Dictum of Lord M'Laren in, disapproved. MACLAINE *v.* GATTY **H. L. (Sc.) 376**

—— *Stanley* v. *Western Insurance Co.* (1868) L. R. 3 Ex. 71.
Approved. CURTIS'S AND HARVEY (CANADA), LD. *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO. **J. C. 303**

—— *Trafford* v. *The King* (1832) 8 Bing. 204.
Discussed. GERRARD *v.* CROWE **J. C. 395**

CASES—*continued.*

—— *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (1884) 13 Q. B. D. 131.
Distinguished. GERRARD *v.* CROWE **J. C. 395**

CERTIFICATE—Disablement, of.
See WORKMEN'S COMPENSATION.

—— Medical, as to soundness of mind.
See LUNACY.

CHAIRMAN OF BOARD OF GUARDIANS—Reception order by.
See LUNACY.

CLERGY DISCIPLINE ACT, 1892—*Practice —Leave to appeal—Appeal on Facts — Grounds for giving Leave — Retrial before Judicial Committee—Proof necessary to justify Conviction.* WAKEFORD *v.* BISHOP OF LINCOLN **J. C. 813**

COLLIERY SPOIL—Tipping on mountain side—Escape.
See NEGLIGENCE.

COLLISION.
See SHIPPING.

COLONIAL TAX—Repayment—Preference shares—Income tax—Deduction—Computation—Right of preference shareholders to benefit by repayment.
See REVENUE.

COLONIES.
See AUSTRALIA, CANADA, NEW ZEALAND and SOUTH AFRICA.

COMMON—Grant of—Validity.
See CANADA.

COMPROMISE—Municipal taxation—Claim to exemption.
See CANADA.

COMPULSORY PILOTAGE.
See SHIPPING.

CONCURRENT FINDINGS.
See SHIPPING.

CONDEMNATION—Neutral ship.
See PRIZE COURT.

CONTRABAND — Cargo — Neutral ship — Condemnation.
See PRIZE COURT.

—— Carriage of—Freight.
See PRIZE COURT.

—— Doctrine of infection.
See PRIZE COURT.

—— Enemy destination.
See PRIZE COURT.

—— Goods—Delay in release of.
See PRIZE COURT

CONTRACT TO BE PERFORMED WITHIN JURISDICTION—Service out of jurisdiction.
See CANADA.

"CONSEQUENCES OF WARLIKE OPERATIONS."
See INSURANCE (MARINE) and SHIPPING.

CONVOY—Sailing under.
See INSURANCE (MARINE).

COST OF INSURANCE—Release of cargo.
See PRIZE COURT.

COVENANT—Breach—Waiver.
See LANDLORD AND TENANT.

CROSSING COURSES.
See SHIPPING.

CROWN—Breach of covenant—Waiver.
See LANDLORD AND TENANT.

—— Damages against.
See PRIZE COURT.

CROWN PROPERTY—Sale by sheriff—Title of purchaser.
See CANADA.

DAMAGE—Unrepaired.
See UNREPAIRED DAMAGE.

DAMAGES—Contraband goods—Delay in release of.
See PRIZE COURT.

—— Crown, against.
See PRIZE COURT.

—— Purchase of neutral ship from enemy—Profits earned by ship under requisition.
See PRIZE COURT.

DECLARATION OF LONDON.
See PRIZE COURT.

DECLARATION OF PARIS.
See PRIZE COURT.

DELAY—Release of goods seized as contraband—Damages.
See PRIZE COURT.

DELIVERY—Enemy cargo—Sale in transitu.
See PRIZE COURT.

—— Refusal to take—Sale of ships.
See CANADA.

DEMISE—Ship—Claim of owners to salvage.
See SHIPPING.

DISABLEMENT—Certificate of.
See WORKMEN'S COMPENSATION.

DIVERSION OF NEUTRAL SHIPS.
See PRIZE COURT.

DIVIDENDS—Shares in foreign company—Income tax—Mode of computation.
See REVENUE.

DIVIDENDS NOT REMITTED TO UNITED KINGDOM—Foreign beneficiary—British trustee—Income tax—Liability.
See REVENUE.

DIVORCE—Husband's misconduct justifying decree for.
See DOMICIL.

DOCKING CLAUSE—Time policy on houseboat at anchor.
See INSURANCE (MARINE).

DOMICIL—*Succession—Husband and Wife—Misconduct of Husband justifying Decree for judicial Separation or Divorce—Wife living apart from Husband—Change of Domicil by Husband—Bigamy.*
Interlocutor of the First Division of the Court of Session in Scotland affirmed.
LORD ADVOCATE *v.* JAFFREY - **H. L. (Sc.) 146**

DOMINION OR PROVINCIAL TITLE — Lands appropriated to Indians.
See CANADA.

ENEMY CARGO—Sale in transitu.
See PRIZE COURT.

ENEMY DESTINATION—Contraband—Evidence of reasonable suspicion.
See PRIZE COURT.

—— —— Onus of proof.
See PRIZE COURT.

—— —— Wool to be combed in enemy country and returned to neutral country.
See PRIZE COURT.

ENEMY PROPERTY—Sale to neutral.
See PRIZE COURT.

ENEMY SHIP—Capture in neutral territorial waters.
See PRIZE COURT.

ESTOPPEL.
See BOND AND DISPOSITION IN SECURITY.

EVIDENCE—Reasonable, of contract—Service out of jurisdiction.
See CANADA.

EXEMPTION—Income tax—Hospital.
See REVENUE.

—— Municipal taxation — Compromise of claim.
See CANADA.

EXPLOSION INCIDENTAL TO FIRE—Fire insurance—Warranty.
See CANADA.

FALSE CERTIFICATION—Action for.
See LUNACY.

FIRE INSURANCE.
See CANADA.

FISHERIES—Tidal water.
See CANADA.

FLOOD—Right to embank against.
See WATER.

FOREIGN BENEFICIARY—British trustee—Income tax—Liability.
See REVENUE.

FOREIGN COMPANY—Shares in—Income tax—Computation of duty on dividends.
See REVENUE.

"FOREIGN POSSESSIONS"—Income tax—Shares in foreign company.
See REVENUE.

"FOREIGN SECURITIES."
See REVENUE.

FORFEITURE—Lease—Breach of covenant—Waiver.
See LANDLORD AND TENANT.

FREIGHT—Carriage of contraband.
See PRIZE COURT.

GOODS—Contraband.
See PRIZE COURT.

HEIR TO BARONETCY—Bequest to, after life estates—Time for ascertaining heir.
See WILL.

HOSPITAL—Income tax—Exemption—Letting out rooms for entertainments.
See REVENUE.

HOSTILITIES—Consequences of.
See WARLIKE OPERATIONS.

HOUSEBOAT AT ANCHOR—Time policy.
See INSURANCE (MARINE).

HUSBAND AND WIFE.
See DOMICIL.

IMPEDIMENT TO MARRIAGE—Relationship.
See CANADA.

INDIAN IMMIGRANTS.
See SOUTH AFRICA.

INDIANS—Lands appropriated to — Crown property—Sale by sheriff.
See CANADA.

INDUSTRIAL DISEASE—Removal of diseased organ—Certificate of disablement.
See WORKMEN'S COMPENSATION.

INFECTION—Doctrine of.
See PRIZE COURT.

INJUNCTION—Libel.
See SERVICE OUT OF THE JURISDICTION.

INSURANCE—Cost of—Release of cargo.
See PRIZE COURT.

INSURANCE (FIRE).
See CANADA.

INSURANCE (MARINE) — *Partial Loss — Damage unrepaired—Subsequent total Loss during the Currency of Policy—Merger.*
Decision of the Court of Appeal [1920] 2 K. B. 25 reversed and decision of Bailhache J. [1919] 2 K. B. 643 restored.
BRITISH AND FOREIGN INSURANCE CO., LD. *v.* WILSON SHIPPING CO., LD. - **H. L. (E.) 188**

INSURANCE (MARINE)—*continued.*
2. —— *Time Policy on Houseboat at Anchor—"Liberty to shift"—"Including all risk of docking"—Houseboat being towed to Dock—Loss through Peril of Sea—Abandonment of insured Adventure.*
Decision of the Court of Appeal [1920] 1 K. B. 447 affirmed. MOUNTAIN *v.* WHITTLE **H. L. (E.) 615**

3. —— *War Risks—Sailing under Convoy — Loss by Stranding — "Consequences of hostilities or warlike operations."*
Decision of the Court of Appeal [1919] 2 K. B. 670 affirmed. GREEN *v.* BRITISH INDIA STEAM NAVIGATION CO. BRITISH INDIA STEAM NAVIGATION CO. *v.* LIVERPOOL AND LONDON WAR RISKS ASSOCIATION **H. L. (E.) 100**
See SHIPPING.

INTEREST—Proceeds of goods, on—Seizure of goods as contraband.
See PRIZE COURT.

—— Rate of—Reduction—Punctual payment.
See BOND AND DISPOSITION IN SECURITY.

IRELAND.
See SERVICE OUT OF JURISDICTION.

JOINDER OF PLAINTIFFS.
See SHIPPING.

JUDICIAL COMMITTEE—Appeals.
See CANADA, CLERGY DISCIPLINE ACT, 1892, LANDLORD AND TENANT, PRIZE COURT, SHIPPING, SOUTH AFRICA, and WATER.

JUDICIAL SEPARATION—Husband's misconduct justifying decree for.
See DOMICIL.

JURISDICTION—Admiralty.
See SHIPPING.

—— Service of writ out of—Contract to be performed within the jurisdiction.
See CANADA.

—— Service of writ out of—Libel—Injunction.
See SERVICE OUT OF JURISDICTION.

KNOWLEDGE—Shipowner as to contraband.
See PRIZE COURT.

LANDLORD AND TENANT—*Lease—Forfeiture—Breach of Covenant—Waiver—Election— Acceptance of Rent—Proviso requiring Waiver to be in Writing.*
Judgment of the Supreme Court affirmed.
THE KING *v.* PAULSON - - - **J. C. 271**

LANDS APPROPRIATED TO INDIANS — Dominion or provincial title.
See CANADA.

LANDSLIDE—Escape of colliery spoil.
See NEGLIGENCE.

LEASE—Emphyteutic—Agreement for sale.
See CANADA.

—— Forfeiture — Breach of Covenant — Waiver.
See LANDLORD AND TENANT.

—— Option to rent refreshment rooms—Construction.
See RAILWAY.

LETTING ROOMS FOR ENTERTAINMENTS—Profits from—Income tax—Mode of computation.
See REVENUE.

LIBEL—Injunction.
See SERVICE OUT OF JURISDICTION.

LIBERTY TO SHIFT—Time policy on house-boat at anchor.
See INSURANCE (MARINE).

LONDON—Declaration of
See PRIZE COURT.

LOOK-OUT—Defective.
See SHIPPING.

LUNACY—*Pauper — Summary Reception Order—Order by Chairman of Board of Guardians—Certificate by Medical Practitioner — Action for false Certification — Negligence—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 16, 28—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 25.
Decision of the Court of Appeal [1920] 3 K. B. 163 affirmed. EVERETT *v.* GRIFFITHS **H. L. (E.) 631**

MARINE INSURANCE.
See INSURANCE (MARINE).

MARRIAGE—Impediment to—Relationship.
See CANADA.

MEDICAL CERTIFICATE.
See LUNACY.

MERGER—Of partial loss in total loss.
See INSURANCE (MARINE).

MINES AND MINERALS—Precious stones—Ownership.
See SOUTH AFRICA.

MINING REGULATIONS—Breach of.
See RULES AND ORDERS and WORKMEN'S COMPENSATION.

MISCONDUCT—Husband's.
See DOMICIL.

MUNICIPAL TAXATION — Compromise of claim to exemption.
See CANADA.

NEGLIGENCE.
See LUNACY.

2. —— *Nuisance — Mine — Coal Mine—Colliery Spoil—Tipping on Mountain Side—Escape of Colliery Spoil—Landslide.*
Order of the Court of Appeal reversed and judgment of Sargant J. restored. ATT.-GEN. *v.* CORY BROS. & Co. KENNARD *v.* CORY BROS. & Co. . . . **H. L. (E.) 521**

NEUTRAL—Sale of enemy property to — Rights of purchaser.
See PRIZE COURT.

NEUTRAL SHIP—Condemnation.
See PRIZE COURT.

—— Purchase of, from enemy.
See PRIZE COURT.

NEUTRAL SHIPS—Diversion of.
See PRIZE COURT.

NEUTRAL TERRITORIAL WATERS — Capture of enemy ship.
See PRIZE COURT.

NEW ZEALAND.
See WATER.

"NOT UNDER COMMAND" SIGNAL.
See SHIPPING.

NUISANCE.
See NEGLIGENCE.

ONUS OF PROOF — Contraband — Enemy destination.
See PRIZE COURT.

OPTION—To rent railway refreshment rooms.
See RAILWAY.

ORDERS IN COUNCIL.
See PRIZE COURT and RULES AND ORDERS.

PARIS—Declaration of.
See PRIZE COURT.

PARTIAL LOSS—Of ship followed by total loss.
See INSURANCE (MARINE).

PASSING OF PROPERTY.
See PRIZE COURT.

PAUPER LUNATIC.
See LUNACY.

PERIL OF THE SEA.
See INSURANCE (MARINE).

PILOT—Duty of crew to assist.
See SHIPPING.

PRACTICE—Appeal—Judicial Committee.
See CLERGY DISCIPLINE ACT, 1892.

—— Writ—Service out of jurisdiction.
See CANADA and SERVICE OUT OF JURISDICTION.

PRECIOUS STONES—Ownership.
See SOUTH AFRICA.

PREFERENCE SHARES—Income tax—Deduction from dividends — United Kingdom tax—Colonial tax—Repayment of Colonial tax — Right of preference shareholders to benefit by.
See REVENUE.

PRIVATE PROPERTY—Precious stones.
See SOUTH AFRICA.

PRIVY COUNCIL—Appeals.
See JUDICIAL COMMITTEE.

PRIZE COURT—*Contraband—Carriage of—Allowance of Freight.*
Judgment of the Prize Court reversed.
THE PRINS DER NEDERLANDEN - **J. C. 754**

2. —— *Contraband—Enemy Destination—Onus of Proof—Public Auction in neutral Country.*
Judgment of the Prize Court affirmed.
THE NORNE - - - - - **J. C. 765**

3. —— *Contraband — Enemy Destination—Wool to be combed in Enemy Country — Combed Wool to be returned to neutral Country.*
Judgment of the Prize Court affirmed.
THE AXEL JOHNSON; THE DROTTNING SOPHIA - - - - - - **J. C. 473**

4. —— *Contraband— Infection, Doctrine of—Passing of Property—Revocation of Order in Council of October 29, 1914—Order in Council of March 30, 1916—Declaration of Paris.*
Judgments of the Prize Court affirmed subject to a slight modification on the facts.
THE KRONPRINSESSAN MARGARETA; THE PARANA - - - - - - **J. C. 486**

5. —— *Contraband Goods—Damages—Evidence of reasonable Suspicion—Delay in Release of Goods—Restriction on Export—Interest on Proceeds.*
Judgment of the Prize Court affirmed.
THE FALK - - - - - - **J. C. 787**
See below, PRIZE COURT.

6. —— *Damages against Crown—Diversion of neutral Ships — Misconstruction of Order in Council—Right of Search—Order in Council of February 16, 1917.*
Judgment of the Prize Court affirmed.
THE BERNISSE; THE ELVE - - **J. C. 458**

7. —— *Enemy Cargo—Sale in transitu—Delivery under Contract of Sale—Reservation of Right to reject—Title of neutral Purchaser.*
Judgment of the Prize Court reversed.
THE VESTA - - - - - **J. C. 774**

8. —— *Enemy Property—Sale to Neutral after Order for Detention—Rights of Purchaser under Peace Treaty—Treaty of Versailles, art. 297 (b)—Order in Council of March 11, 1915.*
Judgment of the Prize Court affirmed.
THE OSCAR II. (No. 2) - - **J. C. 467**

9. —— *Neutral Ship—Contraband Cargo—Knowledge of Shipowners—Condemnation of Ship.*
Judgment of the Prize Court affirmed.
THE ZAMORA No. 2 - - - **J. C. 801**

10. —— *Neutral Ship — Purchase from Enemy — Validity of Purchase — Previous Services to Enemy Cruiser — "Fleet Auxiliary" — Damages — Profits of Ship under Requisition — Declaration of London, 1909, art. 56.*
Judgment of the Prize Court affirmed.
THE EDNA - - - - - - **J. C. 735**

PRIZE COURT—*continued.*

11. —— *Neutral territorial Waters — Capture of Enemy Ship—Good Faith—Subsequent Loss of Ship—Claim by neutral State.*
Judgment of the Prize Court affirmed.
THE VALERIA - - - - - **J. C. 477**

12. —— *Release of Cargo — Marshal's Expenses—Cost of Insurance.*
Judgment of the Prize Court affirmed.
THE CAIRNSMORE; THE GUNDA - **J. C. 439**

PROFITS—Of ship under requisition—Claim to.
See PRIZE COURT.

PUNCTUAL PAYMENT—Reduction of rate of interest on.
See BOND AND DISPOSITION IN SECURITY.

PURCHASE—Enemy property by neutral after order of detention—Rights of purchaser under Peace Treaty.
See PRIZE COURT.

—— Neutral ship from enemy—Validity.
See PRIZE COURT.

QUEBEC.
See CANADA and LANDLORD AND TENANT.

RAILWAY — *Lease—Covenant — Refreshment Rooms—Option of Renting—Construction.*
Decision of the Court of Appeal [1919] 2 K. B. 29 affirmed. COUNTY HOTEL AND WINE CO., LD. *v.* LONDON AND NORTH WESTERN RY. CO. - - **H. L. (E.) 85**

REASONABLE EVIDENCE OF CONTRACT—Contract to be performed within the jurisdiction.
See CANADA.

REASONABLE SUSPICION—Of enemy destination—Evidence—Contraband.
See PRIZE COURT.

RECEPTION ORDER.
See LUNACY.

REFUSAL TO TAKE DELIVERY—Sale of ships—Service out of jurisdiction.
See CANADA.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.
See RULES AND ORDERS and SHIPPING.

RELATIONSHIP—Impediment to Marriage.
See CANADA.

RELEASE—Cargo—Expenses of detention.
See PRIZE COURT.

—— Goods seized as contraband—Delay.
See PRIZE COURT.

RENT—Acceptance of—Forfeiture—Waiver.
See LANDLORD AND TENANT.

REQUISITION—Profits of ship under.
See PRIZE COURT.

REQUISITION—*continued.*

—— Ship by Admiralty—Liability for war risks.
See SHIPPING.

—— —— Salvage, claim of owners to.
See SHIPPING.

REVENUE — *Income Tax — Assessment — Exemptions — Charity — Hospital — Profits from letting Rooms for Entertainments— Application of Profits to charitable Purposes — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60 *and* 61, *Sch. A, No. VI.; s.* 100, *Sch. D; Cases* 1 *and* 6, *s.* 105— *Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *ss.* 2, 5, 13.
Decision of the Court of Appeal in Ireland reversed. COMAN *v.* GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN - **H. L. (Ir.) 1**

2. —— *Income Tax—Colonial Tax—Repayment—Preference Shares—Proper Deduction from Dividends—Right to Benefit by Repayment — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 54—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 43.
Interlocutor of the Second Division of the Court of Session in Scotland affirmed. SCOTTISH UNION AND NATIONAL INSURANCE CO. *v.* NEW ZEALAND AND AUSTRALIAN LAND CO., LD. - - - **H. L. (Sc.) 172**

3. —— *Income Tax—"Foreign possessions" — "Foreign securities" — Shares in foreign Company — Computation of Duty on Dividends — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, Cases* 4 *and* 5— *Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.
Decision of the Court of Appeal [1919] 2 K. B. 94 affirmed. SINGER *v.* WILLIAMS **H. L. (E.) 41**

4. —— *Income Tax—Foreign Possessions —Shares in foreign Company — Dividends not remitted to United Kingdom — British Trustees of foreign Beneficiaries — Liability to Income Tax — Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.
Decision of the Court of Appeal [1919] 2 K. B. 108 affirmed. WILLIAMS *v.* SINGER. POOL *v.* ROYAL EXCHANGE ASSURANCE **H. L. (E.) 65**

RIGHT IN SECURITY.
See BOND AND DISPOSITION IN SECURITY.

RIGHT OF SEARCH.
See PRIZE COURT.

RIPARIAN OWNER—Water supply.
See CANADA.

ROMAN CATHOLIC CHURCH—Rule of—Impediment to marriage.
See CANADA.

RULES AND ORDERS:—

—— *Explosives in Coal Mines Order, dated September* 1, 1913, *para.* 3 (*a*): A. G. MOORE *v.* DONNELLY. FIFE COAL CO., LD. *v.* SHARP OR GREENWOOD OR COLVILLE **H. L. (Sc.) 329**

RULES AND ORDERS—*continued.*

—— *General Regulations dated July* 10, 1913, *made under s.* 86 *of the Coal Mines Act*, 1911: FIFE COAL CO. *v.* FYFE OR GORDON - **H. L. (Sc.) 329**

—— *Order in Council of March* 11, 1915: THE OSCAR II. (No. 2) **J. C. 467**

—— —— *of March* 30, 1916: THE KRONPRINSESSAN MARGARETA; THE PARANA - - - **J. C. 486**

—— —— *of February* 16, 1917: THE BERNISSE; THE ELVE - **J. C. 458**

—— *Regulations for Preventing Collisions at Sea*, 1897, *art.* 4: S.S. MENDIP RANGE *v.* RADCLIFFE **H. L. (E.) 556**

—— —— *arts.* 19, 21; S.S. MENDIP RANGE *v.* RADCLIFFE - **H. L. (E.) 556**
S.S. ORDUNA *v.* SHIPPING CONTROLLER - - **H. L. (E.) 250**

—— *Rules of Supreme Court* (*British Columbia*): HEMELRYCK *v.* WILLIAM LYALL SHIPBUILDING CO., LD. **J. C. 698**

—— —— (*Ireland*): DUNLOP RUBBER CO. *v.* DUNLOP - - **H. L. (Ir.) 367**

SAILING UNDER CONVOY—Consequence of warlike operations.
See INSURANCE (MARINE).

SAILING WITHOUT LIGHTS—Consequence of warlike operations.
See SHIPPING.

SALE—Crown lands by sheriff—Title of purchaser.
See CANADA.

—— Enemy property to neutral—Rights of purchaser under Peace Treaty.
See PRIZE COURT.

—— Neutral ships by enemy—Validity.
See PRIZE COURT.

—— Ships—Refusal to take delivery—Service out of jurisdiction.
See CANADA.

SALE IN TRANSITU—Enemy cargo—Title of neutral purchaser.
See PRIZE COURT.

SALVAGE—Right of owners to—Demise of ship to Admiralty.
See SHIPPING.

SEA RISK.
See INSURANCE (MARINE) and SHIPPING.

SERVICE OUT OF JURISDICTION—*Contract to be performed within the jurisdiction.*
See CANADA.

2. —— *Libel Action — Injunction — Rules of the Supreme Court* (*Ireland*), 1905, *Order* XI., *r.* 1 (*g*).
Order of the Court of Appeal in Ireland affirmed. DUNLOP RUBBER CO. *v.* DUNLOP **H. L. (Ir.) 367**

SHERIFF—Sale of Crown lands by—Title of purchaser.
See CANADA.

SHIPPING—*Admiralty Jurisdiction — Bill of Lading—Arrest of Ship—Joinder of Plaintiffs—Admiralty Court Act*, 1861 (24 & 25 *Vict. c.* 10), *s.* 6—*Colonial Courts of Admiralty Act*, 1890 (53 & 54 *Vict. c.* 27), *s.* 2, *sub-s.* 2.
Judgment of the Supreme Court of New South Wales affirmed. SHIP MARLBOROUGH HILL *v.* ALEX. COWAN AND SONS, LD. **J. C. 444**

2. —— *Collision— Compulsory Pilotage, Plea of—Duty of Crew to assist Pilot—Defective Lookout—Failure to report material Incidents.*
Decision of the Court of Appeal reversed and decision of Hill J. restored in each case. OWNERS OF S.S. ALEXANDER SHUKOFF *v.* OWNERS OF S.S. GOTHLAND. OWNERS OF S.S. LARENBERG *v.* OWNERS OF S.S. GOTHLAND - - - - **H. L. (E.) 216**

3. —— *Collision—Crossing Courses, Vessels on—"Keep course and speed" Rule—Regulations for Preventing Collisions at Sea, arts.* 19 *and* 21.
Decision of the Court of Appeal [1919] P. 381 affirmed. OWNERS OF S.S. ORDUNA *v.* SHIPPING CONTROLLER - **H. L. (E.) 250**

4. —— *Collision—"Not under command"—Crossing Courses—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 4, 19, 21—*Concurrent Findings.*
Decision of the Court of Appeal [1919] P. 362 affirmed. S.S. MENDIP RANGE *v.* RADCLIFFE - - - **H. L. (E.) 556**

5. —— *Collision—Requisition by Admiralty—Charterparty—Sailing without Lights under Admiralty Orders—Loss of Ship—"Consequences of hostilities or warlike operations"—Liability of Admiralty.*
Decision of the Court of Appeal [1919] 2 K. B. 670 affirmed. BRITAIN STEAMSHIP CO. *v.* THE KING - - - **H. L. (E.) 100**
See INSURANCE (MARINE).

6. —— *Salvage—Tug requisitioned by Admiralty—Demise of Tug to Crown—Right to Salvage—Merchant Shipping (Salvage) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.
Decision of the Court of Appeal [1919] 1 K. B. 299 affirmed. ELLIOTT STEAM TUG CO., LD. *v.* COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM. PAGE *v.* SAME - **H. L. (E.) 137**

SOUTH AFRICA (CAPE)—*Mines and Minerals—Precious Stones—Proclamation of Mine—Private Property—Change of Ownership after prospecting—Precious Stones Act*, 1899 (*No.* 11 *of* 1899, *Cape*), *s.* 41.
Judgment of the Appellate Division affirmed. THOMPSON *v.* MALAN **J. C. 726**

2. —— **(NATAL)**—*Indian Immigrants—Medical Fees—Descendants of indentured Indian—Indian Immigration Act* (*Law* 25 *of* 1891, *Natal*), *ss.* 50, 118.

SOUTH AFRICA (NATAL)—*continued.*
Judgment of the Supreme Court reversed. INDIAN IMMIGRATION TRUST BOARD OF NATAL *v.* GOVINDASAMY - - **J. C. 433**

STATUTES:—
I. IMPERIAL.

1842.
5 & 6 Vict. c. 35 (Income Tax), s. 54: SCOTTISH UNION AND NATIONAL INSURANCE CO. *v.* NEW ZEALAND AND AUSTRALIAN LAND CO., LD. **H. L. (Sc.) 172**
—— —— ss. 60, 61, Sch. A; No. VI., s. 100, Sch. D, Cases 1, 6, s. 105: COMAN *v.* GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN **H. L. (Ir.) 1**
—— —— s. 100, Sch. D, Cases 4, 5: SINGER *v.* WILLIAMS - **H. L. (E.) 41**

1853.
16 & 17 Vict. c. 34 (Income Tax), ss. 2, 5, 13: COMAN *v.* GOVERNORS OF THE ROTUNDA HOSPITAL, DUBLIN **H. L. (Ir.) 1**

1861.
24 & 25 Vict. c. 10 (Admiralty), s. 6: SHIP MARLBOROUGH HILL *v.* ALEX. COWAN AND SONS, LD. - **J. C. 444**

1867.
30 & 31 Vict. c. 3 (British North America), s. 91, head 12: ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR THE PROVINCE OF QUEBEC - **J. C. 413**
—— —— s. 109: ATT.-GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA **J. C. 401**

1890.
53 & 54 Vict. c. 5 (Lunacy), ss. 16, 28: EVERETT *v.* GRIFFITHS **H. L. (E.) 631**
53 & 54 Vict. c. 27 (Colonial Courts of Admiralty), s. 2, sub-s. 2: SHIP MARLBOROUGH HILL *v.* ALEX. COWAN AND SONS, LD. - **J. C. 444**

1891.
54 & 55 Vict. c. 65 (Lunacy), s. 25: EVERETT *v.* GRIFFITHS **H. L. (E.) 631**

1892.
55 & 56 Vict. c. 32 (Clergy Discipline), s. 4: WAKEFORD *v.* BISHOP OF LINCOLN - - - **J. C. 814**

1906.
6 Edw. 7, c. 58 (Workmen's Compensation), s. 1, sub-ss. 1 and 2 (*c*): A. G. MOORE & CO. *v.* DONNELLY. FIFE COAL CO., LD. *v.* SHARP OR GREENWOOD OR COLVILLE. FIFE COAL CO., LD. *v.* FYFE OR GORDON **H. L. (Sc.) 329**

STATUTES—*continued.*

6 Edw. 7, c. 58 (Workmen's Compensation), s. 8, sub-s. 1: ARCHIBALD RUSSELL, LD. *v.* CORSER **H. L. (Sc.) 351**

1911.

1 & 2 Geo. 5, c. 50 (Coal Mines), ss. 61, 86: A. G. MOORE & CO. *v.* DONNELLY. FIFE COAL CO., LD. *v.* SHARP OR GREENWOOD OR COLVILLE. FIFE COAL CO., LD. *v.* FYFE OR GORDON **H. L. (Sc.) 329**

1914.

4 & 5 Geo. 5, c. 10 (Finance), s. 5: SINGER *v.* WILLIAMS - **H. L. (E.) 41** WILLIAMS *v.* SINGER. POOL *v.* ROYAL EXCHANGE ASSURANCE **H. L. (E.) 65**

1916.

6 & 7 Geo. 5, c. 24 (Finance), s. 43: SCOTTISH UNION AND NATIONAL INSURANCE CO. *v.* NEW ZEALAND AND AUSTRALIAN LAND CO., LD. **H. L. (Sc.) 172**

6 & 7 Geo. 5, c. 41 (Merchant Shipping (Salvage)), s. 1: ELLIOTT STEAM TUG CO., LD. *v.* COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM **H. L. (E.) 137**

II. COLONIES.

CANADA (QUEBEC).

Civil Code of Quebec, art. 127: DESPATIE *v.* TREMBLAY - - **J. C. 702**

—— art. 503: CITY OF QUEBEC *v.* BASTIEN - - - **J. C. 265**

Code of Civil Procedure, arts. 399, 2213: ATT.-GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA - **J. C. 401**

13 & 14 Vict. (Can.), c. 42, ss. 1, 2: ATT.-GEN. FOR THE PROVINCE OF QUEBEC *v.* ATT.-GEN. FOR THE DOMINION OF CANADA - - - **J. C. 401**

1861.

Cons. Stats. L. C., c. 41: PRÉSIDENT ET SYNDICS DE LA COMMUNE DE LA-PRAIRIE *v.* COMPAGNIE DE JÉSUS **J. C. 314**

29 Vict. (Can.), c. 11, ss. 3, 6: ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR THE PROVINCE OF QUEBEC - **J. C. 413**

29 Vict. c. 57, Can. (City of Quebec Incorporation), s. 36, sub-ss. 1, 3: CITY OF QUEBEC *v.* BASTIEN - **J. C. 265**

1909.

R. S. Queb. (Quebec Insurance), arts. 7034–6: CURTIS'S AND HARVEY (CANADA), LD. *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO., LD. - - - - - **J. C. 303**

STATUTES—*continued.*

SOUTH AFRICA (CAPE).

1899.

No. 11 of 1899, Cape (Precious Stones), s. 41: THOMPSON *v.* MALAN **J. C. 726**

SOUTH AFRICA (NATAL).

Indian Immigration Act (Law 25 of 1891, Natal), ss. 50, 118: INDIAN IMMIGRATION TRUST BOARD OF NATAL *v.* GOVINDASAMY - - **J. C. 433**

STATUTORY POWERS.
See CANADA.

SUMMARY RECEPTION ORDER.
See LUNACY.

TIDAL WATER FISHERIES.
See CANADA.

TITLE—Crown lands—Lands appropriated to Indians — Dominion or provincial title—Sale by sheriff.
See CANADA.

TOTAL LOSS—Merger of unrepaired damage in.
See INSURANCE (MARINE).

TREATY OF VERSAILLES.
See PRIZE COURT.

UNREPAIRED DAMAGE—Merger in total loss.
See INSURANCE (MARINE).

VERSAILLES—Treaty of.
See PRIZE COURT.

VESTING.
See WILL.

WAIVER—Breach of covenant.
See LANDLORD AND TENANT.

WARLIKE OPERATIONS—Consequences of.
See INSURANCE (MARINE) and SHIPPING.

WAR RISK.
See INSURANCE (MARINE) and SHIPPING.

WATER—*Right to embank against Flood—Injury to Neighbour's Land.*
Judgment of the Court of Appeal of New Zealand affirmed. GERRARD *v.* CROWE **J. C. 395**

WATER SUPPLY—City of Quebec.
See CANADA.

WILL—*Construction—Vesting—Bequest of Stock by Baronet's Son to his Brothers for Life only and then to the Heir to the Baronetcy—Time for ascertaining Heir.*
Decision of the Court of Appeal reversed. LUCAS-TOOTH *v.* LUCAS-TOOTH **H. L. (E.) 594**

WOOL—Contraband—Enemy destination.
See PRIZE COURT.

WORDS :—

—— " Consequences of Hostilities or Warlike Operations " : Britain Steamship Co. *v.* The King - **H. L. (E.) 100**
Green *v.* British Steam Navigation Co. ; British India Steam Navigation Co. *v.* Liverpool and London War Risks Association **H. L. (E.) 100**

—— " Contract to be performed within the jurisdiction " : Hemelryck *v.* William Lyall Shipbuilding Co., Ld. **J. C. 698**

—— " Fleet Auxiliary " : The Edna **J. C. 735**

—— " Foreign Possessions " : Singer *v.* Williams - - **H. L. (E.) 41**

—— " Foreign Securities " : Singer *v.* Williams - - **H. L. (E.) 41**

—— " Including all risk of docking " : Mountain *v.* Whittle **H. L. (E.) 615**

—— " Liberty to shift " : Mountain *v.* Whittle - - **H. L. (E.) 615**

—— " Not under command " : S.S. Mendip Range *v.* Radcliffe **H. L. (E.) 556**

WORKMEN'S COMPENSATION — *Accident arising out of and in the Course of the Employment—Breach of Mining Regulations—Coal Mines Act*, 1911 (1 *& 2 Geo.* 5, *c.* 50), *ss.* 61, 86 ; *Explosives in Coal Mines Order of September* 1, 1913, *para.* 3 (*a*) ; *General Regulations of July* 10, 1913, *paras.* 4, 9—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1 *and* 2 (*c*).

Decision of the First Division of the Court of Session in Scotland reversed in each case. A. G. Moore & Co. *v.* Donnelly. Fife Coal Co., Ld. *v.* Sharp or Greenwood or Colville. Fife Coal Co., Ld. *v.* Fyfe or Gordon - - - - **H. L. (Sc.) 329**

2. —— *Industrial Disease — Removal of diseased Organ—Certificate of Disablement — Validity — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1.

Interlocutor of the First Division of the Court of Session in Scotland affirmed. Archibald Russell, Ld. *v.* Corser **H. L. (Sc.) 351**

WRIT—Service out of jurisdiction.
See Canada and Service out of Jurisdiction.

BIBL. LOND. UNIV.

W. SPEAIGHT & SONS, LTD., PRINTERS, 98–99, FETTER LANE, LONDON, E.C. 4.

BIBL. LONDIN. LIBRY.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

APPEAL CASES.

1921.—A.C.

(p 1 to p. 328).

PART I.—FEBRUARY 2.

TABLE OF CASES.

APPEAL CASES.

	PAGE
ALEXANDER SHUKOFF (OWNERS OF S.S.) *v.* GOTHLAND (OWNERS OF S.S.) H.L. (E.)	216
BRITAIN STEAMSHIP CO. *v.* THE KING H.L. (E.)	99
BRITISH AND FOREIGN INSURANCE CO. *v.* WILSON SHIPPING CO. H.L. (E.)	188
BRITISH INDIA STEAM NAVIGATION CO. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION H.L. (E.)	99
COMAN *v.* ROTUNDA HOSPITAL, DUBLIN (GOVERNORS) .. .. H.L. (IR.)	1
COUNTY HOTEL AND WINE CO. *v.* LONDON AND NORTH WESTERN RY. CO. .. .. .. H.L. (E.)	85
CURTIS'S AND HARVEY (CANADA) *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO. .. .. P.C.	303
ELLIOTT STEAM TUG CO. *v.* ADMIRALTY COMMISSIONERS .. H.L. (E.)	137
GREEN *v.* BRITISH STEAM NAVIGATION CO. .. .. .. H.L. (E.)	99
LAMPSON *v.* QUEBEC CITY .. P.C.	294
LAPRAIRIE COMMON CORPORATION *v.* COMPAGNIE DE JÉSUS .. P.C.	314
LARENBERG (OWNERS OF S.S.) *v.* GOTHLAND (OWNERS OF S.S.) H.L. (E.)	216
LORD ADVOCATE *v.* JAFFREY H.L. (SC.)	146
MONTREAL CITY *v.* SAINTE MARIE COLLEGE .. .. .. P.C.	288
ORDUNA (OWNERS OF S.S.) *v.* SHIPPING CONTROLLER .. .. H.L. (E.)	250
PAGE *v.* ADMIRALTY COMMISSIONERS H.L. (E.)	137
POOL *v.* ROYAL EXCHANGE ASSURANCE H.L. (E.)	65
QUEBEC CITY *v.* BASTIEN .. P.C.	265
REX *v.* PAULSON .. .. P.C.	271
SCOTTISH UNION AND NATIONAL INSURANCE CO. *v.* NEW ZEALAND AND AUSTRALIAN LAND CO. H.L. (SC.)	172
SINGER *v.* WILLIAMS .. H.L. (E.)	41
WILLIAMS *v.* SINGER .. H.L. (E.)	65

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C.4.

"THE LAW REPORTS, 1921," for February consist of :—

Chancery Division	Part II.
King's Bench and Probate Divisions	Part II.
Appeal Cases	Part I.

EDITOR—RT. HON. SIR FREDERICK POLLOCK, BART., K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { FRANK EVANS, } *Barristers-at-Law.*

REPORTERS :

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Privy Council	A. M. TALBOT,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	W. F. BARRY, W. H. GRIFFITH,	*Barristers-at-Law.*
Mr. Justice Eve .. .. AND Mr. Justice Peterson ..	GEORGE MACAN, R. MORRISON,	*Barristers-at-Law.*
Mr. Justice Sargant .. AND Mr. Justice Russell ..	FRANK EVANS, ARTHUR LAWRENCE,	*Barristers-at-Law.*
Mr. Justice Astbury .. AND Mr. Justice P. O. Lawrence	G. R. ALSTON, H. L. FRASER,	*Barristers-at-Law.*
	H. C. GARSIA,	*Barrister-at-Law*
King's Bench Court of Criminal Appeal Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	J. F. CLERK, J. S. HENDERSON, R. F. STUBBING, J RITCHIE, W. L. L. BELL,	*Barristers-at-Law.*
Bankruptcy Cases	W. L. L. BELL,	*Barrister-at-Law.*
Probate and Divorce ..	J. R. BROOKE,	*Barrister-at-Law.*
Admiralty Cases	E. C. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases ..	C. F. JEMMETT,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

DIGEST 1911-1920.

The Council will publish in 1921 a Digest of all cases reported during the ten years 1911-1920 (inclusive).

THE LAW REPORTS, 1921 (Unbound).

	£	s.	d.
ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest)	5	5	0
COMPLETE CURRENT DIGEST, 1921 (a Digest, issued quarterly of all reported cases) (unbound)	1	0	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	3	0	0
DECENNIAL DIGEST, 1891-1900 (in cloth)	1	10	0
DECENNIAL DIGEST, 1901-1910 (in cloth)	1	10	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth)	4	4	0
WEEKLY NOTES, 1921 (unbound)	1	10	0
INDIAN APPEALS, 1921—			
Prepaid Subscribtion if paid before 1st April, 1921 (unbound)	1	1	0
After 31st March, 1921 (unbound)	1	5	0
INDIAN APPEALS. Digest, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS

Cloth	**6s. 9d.** per Vol.
Buckram	**9s. 3d.** „
Half-Calf	**10s. 9d.** „
Half-Morocco	**11s. 6d.** „
Calf	**15s. 0d.** „

WEEKLY NOTES.

	Notes of Cases.	Notes of Cases and Miscellaneous.
Cloth	**7s. 3d.**	**7s. 9d.**
Half-Calf	**11s. 6d.**	**12s. 3d.**
Half-Morocco	**12s. 9d.**	**13s. 3d.**
Calf	**16s. 6d.**	**17s. 9d.**

When the Subscriber's address is more than four miles from the Law Courts a charge of **5s. 6d.** is made for cost of carriage of bound Volumes for the Year.

Unbound parts should be sent to be bound as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.

The back Years of the *Law Reports* since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes*, for 1891 to 1914, the *Indian Appeals* for 1889-1893 and the *Law Reports* 1918 are out of print.

All sums payable to the Council must be prepaid, and (unless a Bankers' Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to:

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C.1.

Vols. I to V
are now ready.

Vol. VI
ready
shortly.

The English & Empire Digest.

Presents every English Case from early times to the present day, including each case in miniature, with relative judicial comments in subsequent decisions.

¶ The success of this Epoch-making work is phenomenal, and the Practitioner who neglects to study its pages is severely handicapped in his proceedings. . . . . .

¶ Subscribe now ! . . . . . .

¶ The fullest information, specimen pages, and terms of subscription, given on application. . . . . .

BUTTERWORTH & CO.,
Bell Yard, Temple Bar, W.C. 2.